FILED
JUL 15 1970
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19.....

No. 402

ALONZO WIMBERLY JENKINS, JR. and McLENDON WASH JENKINS, AS EXECUTORS UNDER THE WILL OF MARTHA O. JENKINS, DECEASED,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, ALONZO WIMBERLY JENKINS, JR., and McLENDON WASH JENKINS, as Executors under the Will of Martha O. Jenkins, Deceased, pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit reversing a judgment of the United States District Court for the Middle District of Georgia, Columbus Division.

OPINIONS BELOW

The Opinion of the Court of Appeals (Appendix, p. A1) of April 20, 1970, and the Opinion of June 1, 1970, of said Court on Rehearing (Appendix, p. A26) are not yet reported. The Opinion of the District Court (Appendix, p. A28) is reported at 296 F. Supp. 203.

JURISDICTION

The judgment of the Court of Appeals was entered April 20, 1970, and the petition for rehearing was denied on June 1, 1970, by an Opinion-Order correcting the previous Opinion. A stay of mandate has been granted to and including July 15, 1970.

Jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED

1. Whether or not Martha O. Jenkins (taxpayer) at the date of taxpayer's death, had or possessed an exercisable general power of appointment under or by virtue of the Will of Ada Lee Jenkins, since the Will of Ada Lee Jenkins had been neither filed for probate, nor offered for probate, nor probated prior to the death of taxpayer.

2. Whether or not the Will of Ada Lee Jenkins created a general power of appointment within the meaning of Section 2041, IRC.

3. Whether or not the inclusion of the value of property constituting assets of the Estate of Ada Lee Jenkins as a part of the gross estate of Martha O. Jenkins (taxpayer) and the assessment of a tax deficiency based thereon is contrary to law and constitutes a deprivation of the property of taxpayer without due process of law, in viola-

tion of the Fifth Amendment of the Constitution of the United States of America (Question No. 3 was not reached in the District Court (296 F. Supp. at p. 210), but was reached and decided against taxpayers by the Court of Appeals).

STATUTES INVOLVED

SECTION 2041 INTERNAL REVENUE CODE (26 USC 2041):

"SEC. 2041. POWERS OF APPOINTMENT.

"(a) IN GENERAL.—The value of the gross estate shall include the value of all property—

* * *

"(2) POWERS CREATED AFTER OCTOBER 21, 1942.—To the extent of any property with respect to which the decedent has at the time of his death a general power of appointment created after October 21, 1942, or with respect to which the decedent has at any time exercised or released such a power of appointment by a disposition which is of such nature that if it were a transfer of property owned by the decedent, such property would be includible in the decedent's gross estate under sections 2035 to 2038, inclusive. A disclaimer or renunciation of such a power of appointment shall not be deemed a release of such power. For purposes of this paragraph (2), the power of appointment shall be considered to exist on the date of the decedent's death even though the exercise of the power is subject to a precedent giving of notice or even though the exercise of the power takes effect only on the expiration of a stated period after its exercise, whether or not on or before the date of the decedent's death notice has been given or the power has been exercised.

* * *

"(b) DEFINITIONS.—For purposes of subsection (a)—

"(1) GENERAL POWER OF APPOINTMENT.—The term 'general power of appointment' means a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate; except that—

"(A) A power to consume, invade, or appropriate property for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent shall not be deemed a general power of appointment.

* * *

"(2) LAPSE OF POWER.—The lapse of a power of appointment created after October 21, 1942, during the life of the individual possessing the power shall be considered a release of such power. The preceding sentence shall apply with respect to the lapse of powers during any calendar year only to the extent that the property, which could have been appointed by exercise of such lapsed powers, exceeded in value, at the time of such lapse, the greater of the following amounts:

(A) $5,000, or

(B) 5 percent of the aggregate value, at the time of such lapse, of the assets out of which, or the proceeds of which, the exercise of the lapsed powers could have been satisfied."

CODE OF GEORGIA, ANNOTATED:

"113-801.—All property, both real and personal, being assets to pay debts, no devise or legacy passes the title until the assent of the executor is given to such devise or legacy."

"113-802.—The assent of the executor may be express or may be presumed from his conduct. Assent should be evidenced by a conveyance of realty or tangible personalty or by an assignment or transfer of a chose in action. In the absence of a prior assent, the discharge of the executor shall be conclusive evidence of his assent. If no assent has been given within one year after the executor has qualified, a devisee or legatee may cite the executor in the court of ordinary to show cause why his assent should not be given or may compel him to assent by an equitable proceeding. The executor may not, by assenting to legacies, interfere with the rights of creditors, nor can he, by capriciously withholding his assent, destroy the legacy."

"113-901.—Upon the death of the owner of any estate in realty, which estate survives him, the title shall vest immediately in his heirs at law, subject to be administered by the legal representative, if there is one: for the payment of debts, the purposes of distribution, and other purposes provided for in this Title. If there is a legal representative, the right to recover such realty shall be in him: if there is none, the heirs may sue in their own names. The title to all other property owned by a decedent shall vest in the administrator of his estate for the benefit of the heirs and creditors."

"113-105.—A will shall take effect instantly upon the death of the testator, however long the probate may be postponed."

"37-612.—Any person holding a power of appointment, general or special, whether exercisable by deed or by will only or otherwise, and whether reserved by the holder of such power or conferred upon him by another, may, as to all or any part of the property covered by such power of appointment, release or relinquish such power completely or may release or relinquish the right to exercise such power except among a limited class set out in such release or relin-

quishment, or may covenant that such power will be exercised only in favor of the members of a limited class, and any such release, relinquishment or covenant executed and delivered as hereinafter provided shall be valid and binding, whether with or without a consideration: Provided that no such release, relinquishment or covenant shall have the effect of permitting such property to be appointed to a person not permitted by the original power."

"37-613.—Any such release, relinquishment or covenant shall be in writing signed by the person holding such power and delivered to anyone interested in such power, including any person in such limited class, or to any fiduciary holding such property or any part thereof, or recorded in the office of the clerk of the superior court of the county in which the property or any part thereof is located."

"37-614. No fiduciary holding or distributing any such property shall be deemed to have notice of such release, relinquishment or covenant or be bound thereby unless and until a copy thereof is delivered to such fiduciary. No bona fide purchaser purchasing such property shall be affected by such release, relinquishment or covenant unless he has notice thereof or unless such release, relinquishment or covenant be recorded in the office of the clerk of the superior court of the county in which such property is located."

"37-615.—This law [§§ 37-612 to 37-616] is declaratory of existing law and shall apply to all such releases, relinquishments and covenants heretofore executed as well as to those hereafter executed."

ESTATE TAX REGULATIONS, SECTION 20.2041-3(d)(6):

"(6) A disclaimer or renunciation of a general power of appointment is not considered to be a release of the power. The disclaimer or renunciation must be unequivocal and effective under local law.

A disclaimer is a complete and unqualified refusal to accept the rights to which one is entitled. There can be no disclaimer or renunciation of a power after its acceptance. In any case where a power is purported to be disclaimed or renounced as to only a portion of the property subject to the power, the determination as to whether or not there has been a complete and unqualified refusal to accept the rights to which one is entitled will depend on all the facts and circumstances of the particular case, taking into account the recognition and effectiveness of such a disclaimer under local law. Such rights refer to the incidents of the power and not to other interests of the decedent in the property. If effective under local law, the power may be disclaimed or renounced without disclaiming or renouncing such other interests. In the absence of facts to the contrary, the failure to renounce or disclaim within a reasonable time after learning of its existence will be presumed to constitute an acceptance of the power."

U. S. CONSTITUTION, AMENDMENT V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT

This case involves a suit for refund of federal estate taxes illegally and erroneously assessed and collected. Jurisdiction in the District Court was conferred under 28 USC 1346 (a).

Martha O. Jenkins, the taxpayer or decedent, was the sister of Ada Lee Jenkins. The two sisters never married and lived together all of their lives in the family homeplace at Midland in Muscogee County, Georgia (R., Vol. I, p. 20).

The younger sister, Ada Lee Jenkins, died on September 24, 1962, at age 78 (R., Vol. I, p. 18). Martha O. Jenkins suffered a heart attack on October 10, 1962 (R., Vol. I, p. 20) and died the next day, October 11, 1962, at age 82 (R., Vol. I, p. 20), seventeen days after her sister's death.

The Will of each sister was offered for probate and probated on October 25, 1962 (R., Vol. I, pp. 19-20), thirty-one days after Ada's death and fourteen days after Martha's death.

Under the will of Ada Lee Jenkins executed on December 23, 1958, she left to her sister Martha O. Jenkins a life estate coupled with a power of invasion or consumption over certain real and personal property then owned by Ada Lee Jenkins and all located in Muscogee County, Georgia. A typical provision of the will is as follows (R., Vol. I, pp. 25-26):

"ITEM SEVEN.

"Should my sister, Martha O. Jenkins, survive me, then in that event, I give, bequeath and devise to Martha O. Jenkins all my right, title and interest in and to the real estate located in Muscogee County, Georgia, in Land Lots Forty (40), Forty-one (41), Forty-two (42), Twenty-three (23), and Twenty-four (24) in the 18th District of said County, to have, hold, use and enjoy for and during her natural life, with full and unlimited power and authority to dispose of the same in fee simple by gift or otherwise at any time during her life without accountability to

anyone, including, but not limited to, the right to sell the timber located on said property without the consent of anyone, and should my sister not dispose of my interest in said real estate during her lifetime, then on her death the same shall pass to and become the absolute property of my nephew, Alonzo Wimberly Jenkins, Jr., if he is then in life; but if he is not then in life, said real estate shall pass to, vest absolutely in and become the property of the surviving child or children of the said Alonzo Wimberly Jenkins, Jr."

Ada Lee Jenkins left an estate of real and personal property of the approximate value of $155,000 (R., Vol. I, p. 18) at the time of her death on September 24, 1962.

Martha O. Jenkins left an estate of real and personal property of the approximate value of $143,000 (R., Vol. I, p. 21) at the time of her death on October 11, 1962, and debts of $330.71 (R., Vol. I, p. 21). Federal estate taxes paid on Ada's estate amounted to $15,880.31 (R., Vol. I, p. 19) and on Martha's estate as filed in the amount of $9,722.78. After audit of the estate tax return for the estate of Martha O. Jenkins, an adjustment was made, the effect of which was to add to her gross estate approximately $125,000 (R., Vol. I, p. 19), this being the value of property over which Internal Revenue Service contended Martha O. Jenkins possessed a general power of appointment under the will of Ada Lee Jenkins. The deficiency resulting from this adjustment was paid and on disallowance of the claim for refund, suit was filed in the District Court.

The District Court found for the taxpayers and entered a Judgment on January 24, 1969, for the full amount claimed (R., Vol. I, p. 91). On appeal, the Court of Appeals for the Fifth Circuit on April 20, 1970, reversed (Appendix, p. A25) the decision of the District Court and on June 1, 1970 denied taxpayers' petition for rehearing in an Opinion-Order correcting the Opinion of April 20, 1970 (Appendix, pp. A26-A27).

REASONS FOR GRANTING WRIT

Preface

Because of this decision of the Fifth Circuit, the estate tax law has been confused in:

(a) Simultaneous death cases and those cases wherein death results within a short period of time prior to probate;

(b) Power of appointment cases wherein an ascertainable standard of conduct is involved; and

(c) All tax cases wherein State law should be controlling in the creation or establishment of property interests or powers subject to taxation.

This decision also imposes an unfair, unjust, illegal and oppressive tax in violation of the due process clause of the Fifth Amendment to the United States Constitution.

First Reason

The first reason for granting this writ is to clarify and settle important and basic questions of the estate tax law, in that:

(a) This decision is contrary to and in conflict with prior decisions of the Fifth Circuit, to-wit:

(1) *United States* v. *Merchants National Bank of Mobile*, 261 F.2d 570 (5 Cir., 1958), holding that at or before the death of the decedent a power of appointment must be exercisable in order for mere possession to be taxable and if exercisable at the time of death, there is that essential control over property and shifting of economic benefits to make the property taxable as a part of the decedent's estate.

(2) *United States* v. *Bank of Clarksdale*, 346 F.2d 638 (5 Cir., 1965), holding there was no general power of ap-

pointment created by the will of the husband since the wife could not exercise the power by her will.

Thus in this, the Jenkins decision, the Fifth Circuit has equated "possessing" power to do something in one's lifetime, i.e., make a deed or will or any other form of conveyance of a "future" interest to be received, as being one and the same thing as "possessing" a power of appointment prior to the establishment of the validity of the document, i.e., the will, giving rise to the power of appointment; and has limited or destroyed the meaning of "exercisable" in the estate tax statute, for the Court has said that from the date of the will of the donor, i.e., 1958, until her death in 1962, the donee could have exercised the power contained in the will by making an inter vivos deed, and that the donee could have disclaimed the power, without waiting for probate to establish the legal validity of any such power, or to establish control over property, or to shift economic benefits to that property. The instant case arose as a fairly simple, factual case involving old-maid sisters and the inherent unfairness of adding $26,000 additional taxes against the estate of the sister who died a few days after the other, and wherein the District Court considered State Court probate to be necessary to bring into existence any power of appointment, or control over property, or to shift economic benefits to that property. Through a strained reasoning process and without even citing or distinguishing the *Bank of Mobile* case, the Fifth Circuit has rendered its decision which we say confuses basic estate tax law as well as state probate law.

(b) As to the meaning of a general power of appointment, this decision is contrary to and in conflict with Second Circuit decisions in the cases of *Pipe's Estate* v. *CIR*, 241 F.2d 210 (2 Cir., 1957) and *May's Estate* v. *CIR*, 283 F.2d 853 (2 Cir., 1960), both cases disallowing as marital

deductions bequests to the testator's wife for life with broad powers of invasion and use, but without power to make testamentary dispositions of the unexpended remainder, and wherein the Second Circuit reasoned that to be a general power of appointment, the surviving spouse must have power to appoint to herself or to her estate. While those cases deal with the marital deduction, the Court refers to the general power of appointment described in §811, now §2041. *Pipe's Estate* says that it is necessary to equate the power to invade and consume the principal with such a general power of appointment and while May's estate says that there is no need to speculate on whether Congress intended to equate the general power of appointment described in §811, now §2041, with the power in the surviving spouse to appoint under the marital deduction that it is plain that the power to invade at will does not comprehend the important power to appoint to the spouse or her estate.

Thus in the decision as rendered by the Fifth Circuit, the Court has held that a general power of appointment as described, under §2041(b)(1), is a general power if the donee can exercise it in favor of himself, *or* his estate, *or* his creditors, *or* the creditors of his estate. This honorable Court should resolve the conflict in favor of a strict construction of the statute and against the construction placed thereon by the Fifth Circuit, for it is self-evident from this case now before the Court of the unwarranted result that can be reached here, for the taxpayer decedent had debts of only $330.71 at the time of her death and her estate was assessed an additional tax of $26,962.73. Thus, if the power were specified to be exercisable in favor only of her creditors, and as was the fact in this case, there was no reasonable opportunity after the death of the donor within which to disclaim such a power, the tax consequences are un-

just, oppressive and uncalled for.

Second Reason

Under this decision, the ascertainable standard exception of §2041(b)(1)(a) can never be established by truth in fact, for if there were ever a factual situation wherein there was no likelihood that the donee, considering her age, health, background, debts and frugal necessities would ever have used or consumed any part of her deceased sister's property, the instant case is one. Coupled with the unreasonable short time limitation to disclaim, resort to truth in fact should be allowable or else taxpayer's constitutional arguments should be upheld.

Third Reason

State law should control in the creation and establishment of property interests and or powers of appointment. Once validly created or established then it is proper that Federal law determine taxability. Under this decision, State Court probate has been relegated to a mere formality and an unprobated will has been, nevertheless, declared operative, contrary to clear Georgia law. See *Chidsey* v. *Brookes*, 130 Ga. 218, 60 S.E. 529; *Foster* v. *Foster*, 207 Ga. 519, 63 S.E.2d 318, and *Pharr* v. *Woodall*, 119 Ga. App. 692, 168 S.E.2d 645.

Fourth Reason

The imposition of the tax was oppressive and illegal in that the taxpayer had been given no reasonable opportunity to disclaim or renounce any power contained in the will of her sister as contemplated both by the estate tax statute and the Treas. Reg. §20.2041(3)(d)(6). With all due deference to the taxing powers of Congress and to measures reasonably incidental to their exercise, there are limitations placed upon those powers by the Constitution's other commands, one of those commands being the due process provision of the Fifth Amendment. This Court

should affirm the constitutional necessity of allowing a taxpayer reasonable opportunity in accordance with the express estate tax regulation to disclaim, and to not presume the acceptance of any power by the taxpayer until the taxpayer has a reasonable time, after the legal existence and validity of such power, to renounce or disclaim. The imposition of this harsh tax constitutes an application of the estate tax laws in an unconstitutional manner in deprivation of taxpayer's property without due process of law in violation of the Fifth Amendment.

ARGUMENT

Three basic points are presented to this Court for review, and on each and every one of these questions the Court of Appeals has erroneously and mistakenly ruled.

I. The Will of Ada Lee Jenkins Had Been Neither Filed for Probate nor Offered for Probate nor Probated Prior to the Death of the Taxpayer, Martha O. Jenkins. Therefore, Taxpayer, at the Date of Her Death, Did Not Have or Possess an Exercisable Power of Appointment under or by Virtue of the Will of Her Sister Ada Lee Jenkins Taxable under Section 2041, I.R.C.

Under Georgia Law, a power of appointment is not an estate and has none of the elements of an estate. Moreover, where an estate is expressly given for life with an added power of disposal conferred upon the life tenant, this does not enlarge the life estate into an estate in fee. See the cases, *Patterson & Company* v. *Lawrence*, 83 Ga. 703c, 10 S.E. 355; *Melton* v. *Camp*, 121 Ga. 693, 694, 49 S.E. 690; *Williams* v. *Jones, Executrix*, 219 Ga. 45, 131 S.E.2d 553; *Osborn* v. *Morrison*, 219 Ga. 169, 171, 132 S.E.2d 58.

It is necessary to probate a will before it can be recognized by law as an instrument passing title to any kind of property. Furthermore, no devise or legacy passes title

until the assent of the executor is given to such devise or legacy. See *Chidsey* v. *Brookes*, 130 Ga. 218, 220, 60 S.E. 529; *Foster* v. *Foster*, 207 Ga. 519, 527, 63 S.E.2d 318; Georgia Code Annotated Section 113-801; Redfearn, Wills Ga., Section 111 (3rd Ed.):

> "Since no instrument intended as a will can become operative until it has been probated, and since the plaintiff's cause of action was entirely dependent upon the alleged will, the plaintiff sought to sustain his case by the introduction of the probate in common form: but the judgment denying probate in solemn form had the effect of setting aside the probate in common form and declaring an intestacy." *Jones* v. *Dean*, 188 Ga. 319, 326, 327, 328, 3 S.E.2d 894.

> "It appears that her husband qualified as executor, and is in possession of all of the property mentioned in the will. While the title to the property may have vested in the brother and sisters as against the trustee, yet the law is well settled that the devisees and legatees can not enter into possession of the property devised and bequeathed, without the assent of the executor. Indeed the Civil Code, Section 3319, declares that the title does not pass to them until the executor gives his assent." *Lester* v. *Stephens*, 113 Ga. 495, 39 S.E. 109.

Woodall et al. v. *Pharr*, 119 Ga. App. 692, 168 S.E.2d 645 (affirmed on certiorari by the Supreme Court of Georgia, 226 Ga. 1, ... S.E.2d .....) (decided on January 8, 1970, the Opinion published in the Georgia Law Reporter Advance Sheet, Vol. 23, No. 11, on March 12, 1970), states:

> "*Code* §113-105 declares: 'A will shall take effect instantly upon the death of the testator, however long the probate may be postponed.' This provision means merely that *after* a will is probated, rights in property are then fixed retrospectively with reference to the law and factual circumstances existing at the time of the testator's death. The provision cannot be

given the simplistic interpretation that an unprobated will is nevertheless operative, as contended by the lessor. In this State it is necessary to probate a will before it can be recognized as an instrument affecting rights in property. *Chidsey* v. *Brookes*, 130 Ga. 218, 220 (60 SE 529, 14 AC 975); *Foster* v. *Foster*, 207 Ga. 519, 537 (63 SE 2d 313).

> "It follows that in the intervening time between the testator's death and probate, the rights of lessee were vested in common in defendant Woodall and the remaining heirs at law, subject to divestment upon probate of the will if the lessee left a will. Defendant Woodall, widow of the original lessee and testator, succeeded alone to the rights of lessee on May 27, 1965, when the will was admitted to probate."

Thus, in the instant case Martha O. Jenkins at the time of her death did not hold legal title to either a life estate nor did she have a right of possession of a life estate. Of more importance, the added power of disposal was neither possessed nor exercisable at the time of her death. This is clear under both the statutory law and case law of Georgia, and is borne out by a thorough consideration of Titles 113-105, 113-801, 113-802, and 113-901 (supra), and the very strong language in *Woodall* v. *Pharr* (supra).

Even in modifying its Opinion, the Court of Appeals in its Opinion-Order of June 1, 1970, has still grossly misinterpreted and misconstrued the basic probate and property laws of Georgia, and erroneously concluded that Martha O. Jenkins could have exercised a power of appointment contained in her sister's will prior to the probate of her sister's will.

In Georgia an unprobated will is inoperative and title is not in the executor named in the will during the interval between death and probate. During the interval title to realty is in the heirs at law and it is necessary to probate a will before the will can be recognized as an instru-

ment affecting rights and property. Upon probate the title of the heirs at law to realty is divested, placed in the executor and no devise passes legal title until the assent of the executor is given. The life estate never vested in Martha O. Jenkins and no exercisable power of appointment vested in her. Such a power is not "property" but "a mere authority." See *Osborn* v. *Morrison*, 219 Ga. 169, 132 S.E.2d 58. Until probated, all of the heirs at law, including Martha O. Jenkins, were vested with the title to all of the real estate owned by Ada Lee Jenkins. Upon probate, the heirs were divested of title to the realty and it vested in the executors.

The case at bar is factually similar to the case of *Townsend* v. *United States*, 232 F. Supp. 219 (E.D. Texas 1964). In that case, the husband died on May 18, 1959 and on May 24, 1959, the widow died. *Up to the time of the widow's death, her husband's will had been neither filed nor offered for probate and subsequent to the death of wife, both wills were filed for probate and were both duly entered for probate on June 15, 1959.* The Court held specifically, on page 222, that:

> ". . . the Court finds and concludes that, because the will of Mr. Musgrove had neither been probated nor offered for probate at the time of Mrs. Musgrove's death, Mrs. Musgrove did not, at the time of her death, possess the power of appointment conferred upon her in her husband's will."

Just as was held in the above case, Miss Martha O. Jenkins did not have or possess any power of appointment under or by virtue of the Will of Ada Lee Jenkins because Miss Martha O. Jenkins died prior to the probate of the will of the said Ada Lee Jenkins.

Moreover, Martha O. Jenkins never had the ability to "exercise" any power or powers given or granted to her

under the will of Ada Lee Jenkins. Not only must a general power of appointment be "possessed" by the donee, but it must be "exercisable" by the donee.

In the case of *United States v. Merchants National Bank of Mobile*, 261 F.2d 570 (5 Cir., 1958), the Court holds:

"(2,3) Undoubtedly, at or before the time of the taxable event, that is, at or before the death of the decedent, *the power must be exercisable in order for its mere possession to be taxable*, for Section 811 (f) (2) states that the value of the gross estate of a decedent includes the value at the time of the death 'to the extent of any property with respect to which the decedent *has at the time of his death* a general power of appointment created after October 21, 1942 * * *.' (Emphasis supplied). If the power of appointment is exercisable at the time of death, it is not material that it was theretofore subject to certain conditions. . . ." (p. 573).

". . . *On the other hand, if the power is conditioned upon an event which had not occurred at the time of the decedent's death, the appointive property is not taxable as a part of the decedent's estate.* . . ." (p. 573).

". . . *If exercisable at the time of death, there is that essential control over the property, and shifting of the economic benefits to make the appointive property taxable as a part of the decedent's estate.*

"Clearly enough, then, *at the time of the incidence of the tax a general power of attorney must be exercisable.* The verb and phrase used in reference to that moment, 'has at the time of his death,' are definite in denoting one precise instant of time. On the other hand, 'created on or before October 21, 1942' connotes some idea of the past and of the future.

"The fact that a general power of appointment must be exercisable at the time of the decedent's death

does not prevent the tracing of its creation back to a time before it became exercisable. . . ." (pp. 573, 574). (Italics mine).

Present Georgia law is much more susceptible to the *Townsend* result than the law then applicable in Texas. Moreover, the Texas law dealing with powers of appointment were subsequently changed. The Court of Appeals should not be allowed to change the Georgia law by a judicial decision—that is, judicial legislation at its best. Only the Georgia Legislature should change this law and then only if the best interest of the citizens of Georgia require it.

Merchants National Bank of Mobile (supra) was cited and relied on heavily by the District Court in its Opinion (R., Vol. I, pp. 84-86), and this important case was never considered by the Court of Appeals in its decision.

Section 2041, I.R.C., contains two parts, one part of which is definitions. The Court of Appeals ignored the fact that the very definition of a general power of appointment contained in this section of the I.R.C. requires that the power be one which "is *exercisable* in favor of the decedent, his estate, his creditors or the creditors of his estate . . ." In reaching the erroneous decision which it did in this case, the Court of Appeals had to ignore *Merchants National Bank of Mobile* (supra), because if the Court recognized that case it would have been compelled to have reached a contrary decision.

Under the law of Georgia, Martha O. Jenkins never had an exercisable power of appointment in the property of her sister. Not only does the statutory law and case law of Georgia amply recognize this fact, but the will of Ada Lee Jenkins does, too. Item Sixteen of the Will (R., Vol. I, p. 13) provides:

> "Upon the probate and submission to record of this my will, it is my desire that . . ."

This Court has long recognized that a power of appointment must have legal validity under state law and must bring into being a new interest in property under state law. *Estate of Rogers* v. *Commissioner*, 320 U.S. 410, 64 S.Ct. 172, 88 L.Ed. 134.

Under Georgia law, Martha O. Jenkins did not have an exercisable power of appointment and no new interest in the property owned by Ada Lee Jenkins passed to Martha O. Jenkins during the life of Martha O. Jenkins.

The Opinion of the Court of Appeals (Appendix, p. A1) injects into this case the alleged and hypothetical effect of the District Court decision upon the marital deduction under the estate tax law.

This case does not involve a marital deduction. Involving, as it does, the estates of two maiden sisters, the marital deduction could not be an issue.

Since the Court of Appeals did inject the marital deduction question we feel constrained to point out that:

(a) The marital deduction is a power defined by Statute (I.R.C. 2506) and the defined power "spells-out" what it must contain in order to qualify for the benefit granted.

(b) The marital deduction is concerned with the definition of a power contained in a will of *one* decedent. Here we are concerned with what the decedent of a *second* estate had at the time of her death in the estate of *another* decedent. The will itself says what kind of power a devisee has. Here, under Georgia law, there was no power until the will was probated.

(c) There is no rule of general law and no law peculiarly applicable to estate tax law that says the Taxpayers should be treated unjustly or wrongly because

some other taxpayer in some hypothetical situation may be treated contrary to the way the Government says that it feels such a hypothetical taxpayer should be treated.

(d) There is no rule of legislative construction that uses as a guide the legislative history of one code section in the construction and interpretation of another code section. See opinion of Tuttle, J., in *May's Estate* v. *C.I.R.*, 283 F.2d 853 (2nd Cir., 1960).

II. Martha O. Jenkins Did Not Have a Taxable General Power of Appointment under the Will of Her Sister Ada Lee Jenkins Within the Meaning of Section 2041 of the Internal Revenue Code.

(a) The Court of Appeals exerted a mighty effort to distinguish *U. S.* v. *Bank of Clarksdale*, 346 F.2d 638 (5th Cir., 1965) by trying to distinguish "pre-1942 powers" and "post-1942 powers," when, in fact, the applicable language of Section 2041, I.R.C., which contains the definition of a general power of appointment, the question of whether the power is a pre- or a post-1942 power does not make any difference and whether the power is a pre- or a post-1942 power only becomes important in its application to the first part of the code section as to the taxability of the power.

In *Bank of Clarksdale* (supra), the question presented to the Court of Appeals was whether or not Mrs. Barr received a general power of appointment under the will of her husband. The U. S. urged alternatively that there was no general power of appointment and, if there was, that it was not exercised. The appellate court of Mississipi had construed the will involved as devising to Mrs. Barr a life estate in all the property of her husband with an unlimited power of disposition. The District Court *assumed* that there was a general power of appointment and the Court of Appeals disagreed and re-

versed the District Court holding in favor of the U. S. that there was no general power of appointment since such power of appointment, if any, as Mrs. Barr received could not be exercised by her will.

The Court of Appeals in its decision, at p. 641, clearly stated the question:

> "We come then to the question presented. Whether the property takes a basis as of the death of Mrs. Barr depends on whether she received a general power of appointment under the will of Mr. Barr and went on to exercise the power by will."

The Government's contention in *Bank of Clarksdale* (supra) is thus clearly shown to have been in the alternative. First, there was no general power of appointment since the power could not be exercised by will, and, second, that the power was not exercised, which it had to be since it was a pre-1942 power.

Here we are obviously not concerned with the decision as it relates to a pre-1942 power, but we are with the Government's contention that the power granted to Mrs. Barr was not a general power since it could not be exercised by her will. There has been no change to the statute since the Government's contention in *Bank of Clarksdale* (supra), that this was not a general power nor would any reasonable or logical reading of Section 2041 indicate that its position should be different than it was in 1965.

Bank of Clarksdale (supra), is important for still another reason for it forcibly presents the importance of the fact that there are two sections to Section 2041 and Section (b) (1) defining a general power of appointment as one which "is exercisable in favor of decedent, his estate, his creditors, or the creditors of his estate . . ." is of equal importance to Section (a).

An examination of the Mississippi cases cited and discussed by the Court of Appeals shows that the law of Mississippi is the same as that of the law of Georgia. If anything, the law of Georgia is even stronger than the law of Mississippi in holding that a life estate with an added power of disposal conferred upon the life tenant does not enlarge the life estate into an estate in fee and does not include any right in the life tenant to dispose of the property by will.

> "A power of disposition contained in a will and the mode of its exercise, when the latter will have the effect of cutting out executory devisees, will be strictly construed; and when such power of disposition must be exercised by the holder of a defeasible fee during his lifetime, *he is not authorized to dispose of the property by will, but only by an inter vivos conveyance.*" *Jenkins* v. *Shuften*, 206 Ga. 315, 60 S.E.2d 439.

See also *Williams* v. *Jones, Executrix*, 219 Ga. 45, 131 S.E.2d 553; *Osborn* v. *Morrison*, 219 Ga. 169, 132 S.E.2d 58; and *Melton* v. *Camp*, 121 Ga. 693, 49 S.E. 690.

The Court of Appeals in *Bank of Clarksdale* (supra), stated that its decision was on the basis of relevant Mississippi decisions which "we must look to for direction in this regard. In *Morgan* v. *Commissioner of Internal Revenue*, 1939 (40-1 USTC, Par. 9210), 309 U.S. 78, 60 S.Ct. 424, 84 L.Ed. 585, the Supreme Court stated that guide to be that 'state law creates legal interest and rights. The Federal Revenue Acts designate what interest or rights, so created, shall be taxed.'"

In essence, the relevant language of the will of Miss Ada Lee Jenkins says: "I give, bequeath and devise to Martha O. Jenkins all my right, title and interest . . . to have, hold, use and enjoy for and during her natural life with full and unlimited power and authority to dispose of

the same in fee simple by gift or otherwise at any time during her life without accountability to anyone, including, but not limited to, the right to sell the timber located on said property without the consent of anyone. . . ."

The law of Georgia is clear that such language does not authorize the disposition of the property by will but only by an inter vivos conveyance, and such being the law of Georgia the case before this Court cannot be distinguished in any way from *Bank of Clarksdale* (supra), which was decided to the contrary by the Court of Appeals and which we contend is the applicable law to the case at bar.

As attorneys at law in a small town engaged in the general practice of law, we are cognizant every day of what the word "general" means. A general practice is one in which an attorney tries to adequately represent his clients in police court, trial court, in civil and criminal cases, appellate courts, before administrative bodies of state and federal agencies as well as local and municipal governments, and undertakes to represent the client in his office in matters of contracts, wills, leases, property rights, real estate transactions and such matters as from day to day affect the lives of his clients. By a like analogy, a general power of appointment has to be a power as defined in Section 2041, I.R.C., that "is exercisable in favor of the decedent, his estate, his creditors or the creditors of his estate. . . ." The Court of Appeals for the Fifth Circuit correctly and properly construed the definition of a general power of appointment in *Bank of Clarksdale* (supra) and said that the power therein given was not a general power of appointment since it could not be exercised by will. The Court of Appeals, in its Opinion in the case at bar (Appendix, p. A8), heavily relied on certain text-book writers in reaching its conclusion that the statutory definition of a general power of appointment is "cast in

the disjunctive" and if the donee can exercise it in favor of himself *or* his estate *or* his creditors *or* the creditors of his estate, then it is a general power. This is judicial legislation of the rankest sort. Two cases are cited as being in accord with this interpretation: *Estate of Edelman* (1962), 38 T.C. 972, and *Phinney* v. *Kay* (5th Cir. 1960), 275 F.2d 776. *Edelman* is a decision of the administrative court of the Internal Revenue Service. The *Edelman* case was wrong in 1962 when it was decided, and it is wrong today. There is nothing in the legislative history of Section 2041, I.R.C., that justifies a disjunctive theory. *Phinney*, decided by the Fifth Circuit in 1960, is not a true life estate situation but involved a "defeasible fee." Both of these cases were decided years before the Government contended in *Bank of Clarksdale* (supra) that a power not exercisable by will was not a general power and years before the Fifth Circuit decided *Bank of Clarksdale* (supra), and just as the Fifth Circuit ignored the erroneous decision in *Edelman* and the erroneous dictum in *Phinney*, in reaching a proper conclusion in *Bank of Clarksdale* (supra), it should have reached the same conclusion in the case at bar.

If Congress, in adopting the Internal Revenue Code of 1954, had wanted Section 2041 to define a general power of appointment as one exercisable by the donee in favor of himself *or* his estate *or* his creditors *or* the creditors of his estate, the Congress and the Congress alone should have placed these disjunctive words into the code section. Certainly these words should not be placed in the code section or omitted from the code section at the convenience of the Fifth Circuit, as that Court seems to do—first by not doing so in *Bank of Clarksdale* (supra) and then by doing so in the case now in this Court.

(b) In arguing the case at bar in the District Court, the taxpayers contended further that there was no general

power of appointment in the decedent because the powers received by the decedent under her sister's will were limited by an ascertainable standard relating to the support or maintenance of decedent, there being no need on the part of decedent to consume, invade, or appropriate property constituting assets of the estate of her sister, and, therefore, qualified under the exception set forth in Section 2041(b)(1)(A) of the Internal Revenue Code. This exception applies where a power was limited by an ascertainable standard relating to the health, education, support or maintenance of the taxpayer. Clearly, under the facts existing in this case there was such a limitation. The deposition of Alonzo Wimberly Jenkins, Jr. (R., Vol. I, 50-70, at pages 52, 53, 58-59, 62) established that decedent lived a simple, frugal life, doing her own housekeeping and cooking. Moreover, she was 82 years of age and had a substantial estate in her own right consisting not only of realty but of readily available liquid assets in the form of cash, stocks and bonds (Estate Tax Return, Form 706, Schedule B and C). As the Court reads the deposition of Alonzo Wimberly Jenkins, Jr., the Court will see that both decedent and her sister were financially well-situated, with small fixed needs and expenses. Furthermore, the deposition reveals that the sisters were very close to each other and each was aware of the other's financial position (R., Vol. I, p. 68). However, in response to questions by the Government's attorney, Mr. Tribbey, it was the nephew's opinion from his observation and close contact with his aunts that each of the aunts wanted the other to have access to her wealth in the event of her death only if it was needed in an emergency and that the assets were there if one of the aunts needed the same for an emergency (R., Vol. I, p. 69).

"... *A power of sale and the mode of its exercise, when the latter has the effect of cutting out remainder-*

men, must be strictly construed. Cochran v. *Groover,* 156 Ga. 323 (4), 339 (118 S.E. 865). A power to sell property does not authorize the person to whom it is given to waste it or to dispose of it for an inadequate consideration. *It is the duty of a life tenant to preserve and protect the estate in remainder and the relation of the life tenant to the remaindermen has been recognized by this court to be to a certain extent a fiduciary one and termed an implied or quasi trusteeship.* Barmore v. Gilbert, 151 Ga. 260, 262 (106 S.E. 269, 14 ALR 1060); and Bienvenu v. First Nat. Bank of Atlanta, 193 Ga. 101, 106 (17 S.E.2d 257)." *Osborn* v. *Morrison,* 219 Ga. 169, at page 171.

In the case of *Schwab* v. *Allen,* 78 F. Supp. 234 (D.C., M.D.Ga., 1948), the Court held that the power of encroachment given the husband under the will of his wife came within the exception set forth hereinabove, then Section 811(f)(2)(A), I.R.C., in that there was no likelihood, considering the husband's circumstances, that he would ever have encroached upon the corpus.

See also the case of *Pittsfield National Bank* v. *United States,* 181 F. Supp. 851 (U.S. D. Ct., D. Mass., 1960), in which the Court held:

"4. Where decedent under will of testatrix was to receive income from a trust during his lifetime together with all or such part of principal as he might from time to time request and he was to be sole judge of his needs and remainder was to go to children and decedent, 75 years of age, had substantial funds of his own and at no time requested trustees to pay over any part of principal, power to invade trust corpus was limited by an 'ascertainable standard' and hence excluded from definition of a 'general power of appointment' and the value of the trust property was erroneously included in decedent's gross estate. 26 U.S.C.A. (I.R.C. 1954) Sections 2041(b)(1)(A), 2055."

Decedent, considering her age, the value of her estate, her manner of living and her family history clearly shows that there was no likelihood that she would ever have exercised any powers of disposition over any property of her sister, Ada Lee Jenkins. The very short interval of 17 days elapsing between the date of the death of Taxpayer and the death of her sister, Ada Lee Jenkins, serves to emphasize the fact that any power of appointment contained in the will of Ada Lee Jenkins was limited by decedent's advanced age, habits, history and her own substantial financial worth. Therefore, the power of appointment was limited by an "ascertainable standard" and excluded by definition from being a general power of appointment.

III. The Inclusion of the Value of Property Constituting Assets of Ada Lee Jenkins As a Part of the Gross Estate of Decedent and the Assessment of a Tax Deficiency Based Thereon Is Contrary to Law and Constitutes a Deprivation of the Property of Decedent Without Due Process of Law in Violation of the Fifth Amendment of the Constitution of the United States of America.

At the time of decedent's death on October 11, 1962, her life estate, if any, together with the power of disposal thereof, in any of the properties constituting assets of the estate of Ada Lee Jenkins, was terminated. Upon termination the rights of the remaindermen then living named in the will of Ada Lee Jenkins became vested subject to the probate of the will of Ada Lee Jenkins and the assent thereto by the co-executors named in the will. The properties of the estate of Ada Lee Jenkins passing to these remaindermen under her said will were received tax free by these remaindermen. To include the value of those properties passing tax free to such remaindermen in the gross estate of decedent and to cause decedent to pay estate taxes on the value thereof, *without decedent at any time receiving the right to the use or benefit of those properties, or of the*

power or right to dispose of those properties, would deprive decedent of her property without due process of law, in violation of the aforesaid Fifth Amendment.

Section 2041(a)(2) of the Internal Revenue Code, as to powers of appointment created after October 21, 1942, affirmatively grants to all taxpayers, and to this taxpayer-decedent in particular, the right to disclaim or renounce any such power of appointment. If taxpayer exercises such right of disclaimer or renunciation, then taxpayer's gross estate shall not have therein included the value of any property with respect to which the taxpayer had at the time of his or her death such general power of appointment so disclaimed or renounced by such taxpayer. If the value of the property of the estate of Ada Lee Jenkins is included in decedent's gross estate and decedent is forced to pay estate taxes thereon, then decedent will be deprived of property without due process of law, in violation of the aforesaid Fifth Amendment, the facts herein affirmatively showing that decedent had neither the opportunity, right nor privilege of disclaiming or renouncing any power of appointment running to decedent by virtue of the will of the said Ada Lee Jenkins.

> ". . . A disclaimer or renunciation of such a power of appointment shall not be deemed a release of such power. . . ." Section 2041(a)(2), I.R.C.

This very valuable right of disclaimer or renunciation was clearly placed within the above statute to grant a right in taxpayers, including decedent, to the free exercise thereof. To deny decedent the exercise of such right can result, and would result in this case, in the depriving of the property of the taxpayer without due process of law, in violation of the Fifth Amendment of the Constitution of the United States of America.

The Regulations provide, Section 20.2041-3(d)(6):

"(6) A disclaimer or renunciation of a general power of appointment is not considered to be a release of the power. The disclaimer or renunciation must be unequivocal and effective under local law. A disclaimer is a complete and unqualified refusal to accept the rights to which one is entitled. There can be no disclaimer or renunciation of a power after its acceptance. In any case where a power is purported to be disclaimed or renounced as to only a portion of the property subject to the power, the determination as to whether or not there has been a complete and unqualified refusal to accept the rights to which one is entitled will depend on all the facts and circumstances of the particular case, taking into account the recognition and effectiveness of such a disclaimer under local law. Such rights refer to the incidents of the power and not to other interests of the decedent in the property. If effective under local law, the power may be disclaimed or renounced without disclaiming or renouncing such other interests. In the absence of facts to the contrary, the failure to renounce or disclaim within a reasonable time after learning of its existence will be presumed to constitute an acceptance of the power."

Therefore, under the Regulations there is a presumption of acceptance of a power by failure to renounce or disclaim within a reasonable time after learning of its existence. How can there be any presumption of acceptance where the taxpayer dies within a matter of days after the death of the donor of a power, the power being contained in the will of the donor, and that will never having been filed for probate or ever having become effective so as to make the power exercisable? Under these circumstances, to include the value of the property constituting the assets of the estate of the donor of the power in the estate of the decedent taxpayer would result in a tax burden upon the estate of the decedent and thereby a taking or depriving

of the property of the decedent without due process of law, in violation of the aforesaid Fifth Amendment.

Ga. Code Ann., Section 37-612, et seq., provides the manner in which the holder of a power of appointment might disclaim or renounce such a power, requiring a writing signed by the person holding such power and the delivery thereof to any one interested in such power or the recording of such notice in the office of the Clerk of the Superior Court of the County in which any property covered by such power of appointment is located. The language in these code sections refers to persons "holding" a power of appointment, indicating the necessity of "possession" of such powers by the "holder".

How can there be in this case any "holding" of a power of appointment by decedent, prior to decedent's death? Surely decedent would not have had to execute a writing disclaiming such power of appointment and record the writing in the office of the Clerk of the Superior Court of Muscogee County, Georgia, prior to the probate of the will conferring or passing such a power of appointment to the decedent so that the decedent could be the "holder" thereof!

Under the facts in this case, decedent was deprived of her free exercise of the right of disclaimer or renunciation. The acts of the Government in including in the estate of decedent the value of the assets of the estate of her sister were arbitrary, void and unconstitutional.

CONCLUSION

The questions of estate tax law presented in this case are basic and important to the fair and impartial administration of the tax laws and these questions have not been, but should be, settled by this Court.

A taxpayer has been harshly, unjustly, unfairly and inequitably treated. Only this Court can correct this wrong.

We, therefore, submit that this petition for a writ of certiorari should be granted.

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J. MADDEN HATCHER

.....

ALAN F. ROTHSCHILD
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.....

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CERTIFICATE OF SERVICE

I, ALAN F. ROTHSCHILD, a member of the Bar of The Supreme Court of The United States, do hereby certify that I have served a copy of the foregoing Petition for Writ of Certiorari by mailing a copy of the same properly addressed, Air Mail postage prepaid, to each of the following:

Solicitor General
c/o Department of Justice
Washington, D. C. 20530

Johnnie M. Walters, Esq.
Assistant Attorney General
Department of Justice
Washington, D. C. 20530

John S. Stephen, Esq.
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Washington, D. C. 20530

William J. Schloth, Esq.
U. S. Attorney
Macon, Georgia

This 13th day of July, 1970

ALAN F. ROTHSCHILD

P. O. Box 2707
Columbus, Georgia 31902

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 27769

ALONZO WIMBERLY JENKINS, JR., ET AL,
as Executors under the Will of
MARTHA O. JENKINS, Deceased,
Plaintiffs-Appellees,

versus

UNITED STATES OF AMERICA,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Georgia

(April 20, 1970)

Before GOLDBERG, DYER and CARSWELL,
Circuit Judges.

GOLDBERG, Circuit Judge: We consider here the application of federal estate tax provisions to an unexercised and evanescent power of appointment. The executors of the estate of Martha O. Jenkins seek approval of the decision below excluding from the decedent's estate the value of certain property subject to a power of appointment. Though equitable considerations invite us to affirm the ruling below in an effort to ameliorate the apparent harshness of the tax in this particular case, legal

imperatives leave us no choice but to reverse and hold that the tax must be paid.

This case grew out of the lives—and deaths—of two sisters, Ada Lee Jenkins and Martha O. Jenkins. These sisters, both of whom were unmarried, lived together in Midland, Georgia, for many years prior to their deaths. Although they owned a substantial amount of property, they lived in a simple, frugal manner. On December 23, 1958, both sisters, who were then in their seventies, executed wills. These wills were very similar in wording and provisions, each sister leaving the other a life estate coupled with a power of invasion or consumption over the testatrix's property.

On September 24, 1962, Ada Lee Jenkins died. Shortly after her sister's death Martha O. Jenkins decided that she did not wish to serve as executrix under her sister's will, and on October 4, 1962, she executed a document renouncing her designation as executrix. She apparently took no other action with regard to the will of her sister. Although she had previously been in good health, on October 10, 1962, Martha suffered a heart attack, and on the following day she died. Because of the short period of time—only seventeen days—between the deaths of the two sisters, Ada's will had not been probated at the time of Martha's death. The wills of both sisters were filed and admitted for probate on October 25, 1962. Two nephews of the sisters, Alonzo Wimberly Jenkins, Jr., and McLendon Wash Jenkins, qualified as the executors of both estates.

The will of Ada Lee Jenkins contained several provisions leaving her surviving sister a life estate coupled with a power of invasion or consumption over certain real and personal property located in Muscogee County,

Georgia. Each of the relevant provisions of the will included language substantially identical to the following:

1. In their entirety the relevant clauses of the will provided as follows:

"ITEM THREE. Should my sister, Martha O. Jenkins, survive me, then and in that event, I give and bequeath to her my Chantilly silverware, to have, hold, use and enjoy for and during her natural life with full and unlimited power and authority to dispose of the same in fee simple, by gift, or otherwise, at any time during her life without accountability to any one. And should my sister not dispose of my Chantilly silverware, then on her death the same shall pass to and become the absolute property of my nieces, Mary Anne Jenkins Thatcher and Ruth Jenkins Waggener, share and share alike; but, if either of my nieces, or both of them, shall be not then in life, the share of the Chantilly silver which would have passed to said deceased niece or nieces had they then been in life shall pass to, and vest absolutely in, the daughter or daughters of the said deceased niece or nieces, then in life, to be shared alike by them.

"ITEM FIVE. Should my sister, Martha O. Jenkins, survive me, then and in that event, I give and bequeath to Martha O. Jenkins all my right, title and interest in and to the engraved Wimberly silverware, consisting of table spoons engraved "MEW", the large forks engraved "MEW", the small forks engraved "ANNIE", and the teaspoons engraved "ANNIE", all of which are the same engraved pattern; and, also the plain Wimberly silverware consisting of small forks engraved "ACP", the teaspoons engraved "JCW", the teaspoons engraved "ANNIE", and the small spoons engraved "ACP"; all of which is the whole of the Wimberly silverware; and, also, my double case watch with long chain, and my diamond ring; to have, hold, use and enjoy for and during her natural life, with full and unlimited power and authority to dispose of the same in fee simple, by gift or otherwise, at any time during her life without accountability to any one. And should my sister not dispose of said Wimberly silverware during her lifetime, or if my sister, Martha O. Jenkins, should predecease me, then I give, bequeath and devise said property to my great niece, Martha Lee Jenkins, if then in life, but if my great niece, Martha Lee Jenkins, be not then in life, the Wimberly silverware shall pass to and vest absolutely in and become the property of the estate of Martha Lee Jenkins.

"ITEM SEVEN. Should my sister, Martha O. Jenkins, survive me, then in that event, I give, bequeath and devise to Martha O. Jenkins all my right, title and interest in and to the real estate located in Muscogee County, Georgia, in Land Lots Forty (40), Forty-one (41), Forty-two (42), Twenty-three (23), and Twenty-four (24) in the 18th Dis-

"Should my sister, Martha O. Jenkins, survive me, then in that event, I give, bequeath and devise to

trict of said County, to have, hold, use and enjoy for and during her natural life, with full and unlimited power and authority to dispose of the same in fee simple by gift or otherwise at any time during her life without accountability to any one, including, but not limited to, the right to sell the timber located on said property without the consent of any one, and should my sister not dispose of my interest in said real estate during her lifetime, then on her death the same shall pass to and become the absolute property of my nephew, Alonzo Wimberly Jenkins, Jr., if he is then in life, but if he is not then in life, said real estate shall pass to, vest absolutely in and become the property of the surviving child or children of the said Alonzo Wimberly Jenkins, Jr.

* * *

"ITEM NINE. Should my sister, Martha O. Jenkins, survive me, then in that event, I give, bequeath and devise to Martha O. Jenkins all my right, title and interest in and to the real estate located in Muscogee County, Georgia, in Land Lots Nine (9), and Eight (8) of the 18th District of said County, and Lot One Hundred Twenty-eight (128) of the 9th District of said County, to have, hold, use and enjoy for and during her natural life, with full and unlimited power and authority to dispose of the same in fee simple by gift or otherwise at any time during her life without accountability to anyone, including, but not limited to, the right to sell the timber located on said property without the consent of anyone, and should my sister not dispose of my interest in said real estate during her lifetime, then on her death the same shall pass to and become the absolute property of my nephew, McLendon Wash Jenkins, if he is then in life, but if he is not then in life, said real estate shall pass to, vest absolutely in and become the property of the surviving child or children of the said McLendon Wash Jenkins, or the surviving child or children of my nephew, Alonzo Wimberly Jenkins, Jr., in the event there are no surviving child or children of the said McLendon Wash Jenkins at the death of my sister.

* * *

"ITEM ELEVEN. Should my sister, Martha O. Jenkins, survive me, then in that event, I give, bequeath and devise to Martha O. Jenkins all my right, title and interest in and to the real estate located in Muscogee County, Georgia, in Land Lots Sixty-five (65), and Sixty-six (66) of the 9th District of said County, to have, hold, use and enjoy for and during her natural life, with full and unlimited power and authority to dispose of the same in fee simple by gift or otherwise at any time during her life without accountability to anyone, including, but not limited to, the right to sell the timber located on said property without the consent of anyone, and should my sister not dispose of my interest in said real estate during her lifetime, then on her death the same

> Martha O. Jenkins all my right, title and interest in and to . . . [certain named property] . . . to have, hold, use and enjoy for and during her natural life, *with full and unlimited power and authority to dispose of the same in fee simple by gift or otherwise at any time during her life without accountability to anyone*, . . . and should my sister not dispose of my interest in said [property] during her lifetime, then on her death the same shall pass to and become the absolute property of [a certain named remainderman]. . . ." (Emphasis added.)

These provisions of the will led to a disagreement between the Commissioner of Internal Revenue and the executors of the estate of Martha O. Jenkins as to the amount of estate taxes due. When the executors computed and filed an estate tax return for the estate of Martha O. Jenkins, they excluded from her gross estate the value of the property in which she received a life estate with powers of invasion by her sister's will. The Commissioner, however, ruled that the value of this property must be included because Martha's powers of invasion constituted a general power of appointment over such property. After paying the additional estate taxes required by the Commissioner's ruling, the executors filed a claim for a refund. When this claim was disallowed, the executors filed suit in the United States District Court for the Middle District of Georgia, seeking a refund in the amount of $26,962.73.

As plaintiffs in the district court the executors advanced four alternative contentions in support of their position that the value of the property in dispute should

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shall pass to and become the absolute property of my great niece, Martha Lee Jenkins, if she is then in life, but if she is not then in life, said real estate shall pass to, vest absolutely in and become the property of the estate of the said Martha Lee Jenkins."

not be included in Martha O. Jenkins' estate for estate tax purposes. First, they contended that Martha did not have a general power of appointment because she could dispose of the property only inter vivos and not by will. Second, they contended that her power of appointment was not a general power because it was "limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent." Int. Rev. Code of 1954, § 2041(b)(1)(A), 26 U.S.C.A. § 2041(b)(1)(A). Third, they contended that Martha did not possess an exercisable general power of appointment at the time of her death because Ada's will had not yet been probated. Finally, plaintiffs contended that requiring Martha's estate to pay the amount of estate taxes in dispute would amount to a deprivation of property without due process of law in violation of the Fifth Amendment.

The district court, hearing the case on stipulated facts, entered judgment for the plaintiffs. In its opinion the court accepted plaintiffs' first and third contentions, rejected their second contention, and did not reach the fourth. *Jenkins* v. *United States*, M.D. Ga. 1968, 296 F.Supp. 203. The government appeals to this court. For the reasons hereinafter given, we are compelled to reject each of the plaintiffs' contentions, and we therefore reverse the judgment of the district court.

I.

Plaintiffs' first contention is that decedent did not have a general power of appointment because her power could be exercised only inter vivos and not by will. We reject this contention because it involves a patent misconstruction of the relevant provisions of the Internal

Revenue Code. Section 2041 of the Code[2] provides that the value of the decedent's gross estate shall include the

2. Int. Rev. Code of 1954, § 2041, 26 U.S.C.A. § 2041, provides in pertinent part as follows:

§ *2041. Powers of appointment*

(a) In general.—The value of the gross estate shall include the value of all property.

(1) Powers of appointment created on or before October 21, 1941.—To the extent of any property with respect to which a general power of appointment created on or before October 21, 1942, is exercised by the decedent—

(A) by will, or

(B) by a disposition which is of such nature that if it were a transfer of property owned by the decedent, such property would be includible in the decedent's gross estate under sections 2035 to 2038, inclusive;

but the failure to exercise such a power or the complete release of such a power shall not be deemed an exercise thereof. If a general power of appointment created on or before October 21, 1942, has been partially released so that it is no longer a general power of appointment, the exercise of such power shall not be deemed to be the exercise of a general power of appointment if—

(i) such partial release occurred before November 1, 1951, or

(ii) the donee of such power was under a legal disability to release such power on October 21, 1942, and such partial release occurred not later than 6 months after the termination of such legal disability.

(2) Powers created after October 21, 1942.—To the extent of any property with respect to which the decedent has at the time of his death a general power of appointment created after October 21, 1942, or with respect to which the decedent has at any time exercised or released such a power of appointment by a disposition which is of such nature that if it were a transfer of property owned by the decedent, such property would be includible in the decedent's gross estate under sections 2035 to 2038, inclusive. A disclaimer or renunciation of such a power of appointment shall not be deemed a release of such power. For purposes of this paragraph (2), the power of appointment shall be considered to exist on the date of the decedent's death even though the exercise of the power is subject to a precedent giving of notice or even though the exercise of the power takes effect only on the expiration of a stated period after its exercise, whether or not on or before the date of the decedent's death notice has been given or the power has been exercised.

value of property over which the decedent at the time of his death possessed a "general power of appointment."

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(3) *Creation of another power in certain cases.*—To the extent of any property with respect to which the decedent—

(A) by will, or

(B) by a disposition which is of such nature that if it were a transfer of property owned by the decedent such property would be includible in the decedent's gross estate under section 2035, 2036, or 2037,

exercises a power of appointment created after October 21, 1942, by creating another power of appointment which under the applicable local law can be validly exercised so as to postpone the vesting of any estate or interest in such property, or suspend the absolute ownership or power of alienation of such property, for a period ascertainable without regard to the date of the creation of the first power.

(b) *Definitions.—For purposes of subsection (a)—*

(1) *General power of appointment.*—The term "general power of appointment" means a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate; except that—

(A) A power to consume, invade, or appropriate property for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent shall not be deemed a general power of appointment.

* * *

(2) *Lapse of power.*—The lapse of a power of appointment created after October 21, 1942, during the life of the individual possessing the power shall be considered a release of such power. The preceding sentence shall apply with respect to the lapse of powers during any calendar year only to the extent that the property, which could have been appointed by exercise of such lapsed powers, exceeded in value, at the time of such lapse, the greater of the following amounts:

(A) $5,000, or

(B) 5 percent of the aggregate value, at the time of such lapse, of the assets out of which, or the proceeds of which, the exercise of the lapsed powers could have been satisfied.

(3) *Date of creation of power.*—For purposes of this section, a power of appointment created by a will executed on or before October 21, 1942, shall be considered a power created on or before such date if the person executing such will dies before July 1, 1949, without having republished such will, by codicil or otherwise, after October 21, 1942.

For estate tax purposes, therefore, property over which a decedent possessed such a power is treated as if the decedent actually "owned" the property in the conventional sense. Section 2041(b)(1) defines a "general power of appointment" as "a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate."

The statutory definition is thus cast in the disjunctive. A power of appointment is a general power under § 2041(b)(1) if the donee of the power can exercise it in favor of himself *or* his estate *or* his creditors *or* the creditors of his estate. Professors Lowndes and Kramer have succinctly described a general power in the following language:

> "A general power is a power under which the donee of the power can appoint the property subject to the power to himself, his estate, his creditors or the creditors of his estate, either directly or indirectly. *It is not necessary that he be able to appoint to all four of these objects. The power will be general if it can be exercised in favor of any one of them.*" Lowndes & Kramer, Federal Estate and Gift Taxes § 12.5, at 262 (2d ed. 1962) (emphasis added; footnote omitted).

Accord, *Estate of Edelman*, 1962, 38 T.C. 972, 977; 2 Mertens, The Law of Federal Gift and Estate Taxation § 19.09, at 519-20 (1959); Stephens & Maxfield, The Federal Estate and Gift Taxes 117-18 (2d ed. 1967); Craven, *Powers of Appointment Act of 1951*, 65 Harv. L. Rev. 55, 70 (1951); Comment, 51 Mich. L. Rev. 85, 92-93 (1952). See *Phinney* v. *Kay*, 5 Cir. 1960, 275 F.2d 776 (holding that an inter vivos power of disposition constituted a general power of appointment for estate tax purposes).

In the case at bar the decedent received by virtue of her sister's will a life estate in the property involved with

an unlimited power of disposition. Thus she had the power to make inter vivos dispositions of the property, but she could not dispose of the property by will. In statutory terminology, she had the power to appoint the property to herself or to her creditors, but she did not have the power to appoint the property to her estate or to the creditors of her estate. In view of the definition contained in § 2041 (b)(1), the fact that decedent could appoint to herself or to her creditors was sufficient to make her power of appointment a general power. Her inability to make appointments either to her estate or to the creditors of her estate was irrelevant.

Notwithstanding the express language of the statute, plaintiffs contend that a power which can be exercised only inter vivos and not by will cannot be a general power. The only authority advanced by plaintiffs in support of this proposition is the holding of this court in *United States v. Bank of Clarksdale*, 5 Cir. 1965, 346 F.2d 638. Plaintiffs interpret *Bank of Clarksdale* as a holding that a power of appointment cannot be a general power if it is not exercisable by will, and the court below apparently agreed with this interpretation. 296 F.Supp. at 205-06. We think it is crystal clear, however, that plaintiffs have totally misconstrued our holding in *Bank of Clarksdale*. Nothing in that case supports plaintiffs' position in the present case.

A discussion of *Bank of Clarksdale* must begin with a recognition of the distinction between "pre-1942 powers" (powers created on or before October 21, 1942) and "post-1942 powers" (powers created after October 21, 1942). The value of property subject to a pre-1942 power is includable in the gross estate only if the power was *exercised* by the decedent, either by will or by certain inter vivos dispositions. I.R.C. § 2041(a)(1). In the case

of post-1942 powers, on the other hand, the value of the property subject to the power is includable in the gross estate if the power was merely *exercisable* at the time of the decedent's death. I.R.C. § 2041(a)(2).

Bank of Clarksdale involved a pre-1942 power. A crucial inquiry, therefore, was whether or not the decedent had exercised her power. Moreover, since none of the parties to the litigation ever suggested that the decedent had exercised her power *during her lifetime*, the only dispute concerning this issue was whether she had exercised her power *by will*. We held that she had not exercised her power of appointment by her will and thus that she had not exercised it at all. It is important to note that this was the only issue we decided. We found it unnecessary to reach the issue of whether the decedent had in fact possessed a general power of appointment. Moreover, there is no language in that opinion which even implies that a power of appointment must include the power of disposition *by will* to be a general power. Thus plaintiffs' reliance on *Bank of Clarksdale* is completely misplaced.

In the instant case we are concerned with a post-1942 power. With regard to such a power, we need not ask whether the decedent *did* exercise the power; the only relevant inquiry is whether the decedent *could* have exercised it in favor of herself *or* her creditors *or* her estate *or* the creditors of her estate. Since it is undisputed that Martha O. Jenkins had a power which she could exercise in favor of herself or her creditors, it is clear that she possessed a general power of appointment within the meaning of § 2041(b)(1) of the Internal Revenue Code.

II.

Plaintiffs next advance the contention that decedent's power of appointment was not a general power because it came within the "ascertainable standard" exception found in § 2041(b)(1)(A). This section provides:

> "A power to consume, invade, or appropriate property for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent shall not be deemed a general power of appointment."

Plaintiffs make much of the fact that decedent had a substantial amount of property of her own and of the fact that she lived in an exceedingly frugal manner. Because of these facts, which are undisputed, plaintiffs contend that "there was no likelihood" that decedent would ever have exercised any of her powers of disposition over the property involved. Therefore, plaintiffs ask us to conclude, decedent's power of appointment was limited by an ascertainable standard within the meaning of the Code. We reject this contention, as did the court below. 296 F.Supp. at 208-10. The district court's analysis of this issue was eminently correct, and we quote with approval from the opinion below:

> "In this connection the evidence shows that at the time of her sister's death Martha O. Jenkins was 82 years of age and was possessed of a substantial estate in her own right consisting of real and personal property having a value of approximately $150,000.00. The evidence further shows that the two sisters lived in a very conservative manner, growing their own vegetables and raising their own chickens and spending not more than about $5.00 a week for groceries. They wore black cotton dresses and would spend money on nothing unless it was absolutely necessary. It is interesting to note that they resisted until the end the urgings of their relatives that they buy themselves a

television set, which fact may be regarded not only as evidence of their frugality but as a monument to their discretion.

"The Court is convinced that Martha O. Jenkins would never have encroached upon her sister's estate to satisfy any of her own meager wants or needs, first because she had no need to do so, and second because the remaindermen named in her sister's will were the same remaindermen who were the beneficiaries under her own will later probated, but the question is not what she *would* have done with the property, but rather what she *could* have done with it." 296 F.Supp. at 209 (emphasis in original).

The district court was correct in holding that the relevant inquiry is not what the decedent may have *planned* to do with the property, but rather what she was *empowered* to do. An ascertainable standard must be a *prescribed* standard, not a post-prescriptive course of action. The acting out of the standard is irrelevant, for it is the script rather than the actor which controls a decision concerning the existence of an ascertainable standard. In determining what the decedent was *empowered* to do, courts must look to the express language of the instrument creating the power, or to the language of the instrument as modified by state law. See, e.g., *Miller v. United States*, 3 Cir. 1968, 387 F.2d 866; *Strite v. McGinnis*, 3 Cir. 1964, 330 F.2d 234, *cert. denied*, 379 U.S. 836; *Potter v. United States*, N.D. W. Va. 1967, 269 F.Supp. 545; *Stafford v. United States*, E.D. Wis. 1964, 236 F.Supp. 132; *Ewing v. Rountree*, M.D. Tenn. 1964, 228 F.Supp. 137, *aff'd*, 6 Cir. 1965, 346 F.2d 471, *cert. denied*, 382 U.S. 918; *Pittsfield National Bank v. United States*, D. Mass. 1960, 181 F.Supp. 851; *Estate of Lanigan*, 1965, 45 T.C. 247.

In the instant case the instrument creating the power —the will of Ada Lee Jenkins—gave Martha O. Jenkins

"full and unlimited power and authority to dispose of the [property] in fee simple by gift or otherwise at any time during her life without accountability to anyone." It is difficult to imagine a more unlimited, open-ended, free-wheeling power than this. Moreover, Georgia law does not modify such language by *implying* any "support and maintenance" limitation. See *Williams v. Jones*, 1963, 219 Ga. 45, 131 S.E.2d 553; *Townsley v. Townsley*, 1952, 209 Ga. 323, 72 S.E.8d 289. In the words of the district court,

> "we can only conclude that the will gave Martha O. Jenkins an unlimited right to consume or give away *inter vivos* any or all of her sister's property regardless of whether such encroachment was for support and maintenance or for some other purpose." 296 F.Supp. at 210.

Her complete power over the property during her lifetime was not modified by any standard other than one she might impose on herself. Thus her power was not limited by any "ascertainable standard" within the meaning of § 2041(b)(1)(A).

III.

Plaintiffs' third contention is that decedent did not possess an exercisable general power of appointment at the time of her death because the will of Ada Lee Jenkins had not then been probated or filed or offered for probate. Plaintiffs prevailed on this issue in the district court.[3] 296 F.Supp. at 206-08. Our examination of this contention, however, leads us to the conclusion that it must be rejected.

We note at the outset that there is no language in the will itself which evidences a desire on the part of

3. This aspect of the district court's opinion has been commented upon by a student writer in the Georgia Law Review. Note, 3 Ga. L. Rev. 766 (1969).

Ada that Martha's possession of the power of appointment was to be postponed until some time after Ada's death. On the contrary, the relevant provisions of the will are couched in terms of the moment when Martha survived Ada, i.e., the moment of Ada's death:

> "Should my sister, Martha O. Jenkins, survive me, then in that event, I give, bequeath and devise to Martha O. Jenkins all my right, title and interest: . . ."

The district court, however, found significance in the language of Item Sixteen of the will, which provides in part:

> "*Upon the probate and admission to record* of this my will, it is my desire that my executrix, executors or executor administer my estate with [sic] the control or supervision of any Court or other authority and to that end, reposing special confidence in them, I relieve them and each of them of accountability to any Court or other authority in the administration, management and final distribution of my estate." (Emphasis added.)

The district court placed special emphasis on the first seven of the quoted words. We cannot agree, however, with the court's apparent conclusion that these words expressed a desire on the part of the testatrix to postpone her surviving sister's possession of the power of appointment. On the contrary, when these words are read in the context of the entire sentence, it is clear that they have reference only to the procedure of probating the will, and not to the timing of the passage of the power of appointment to Martha O. Jenkins.

Moreover, we find nothing in Georgia law which leads us to conclude that Martha's possession of the power would have been postponed until probate or until any

other point in time later than the death of Ada. In the absence of any contrary provision in the will itself, we think it is clear that Martha received an exercisable general power at the moment of Ada's death.

With regard to the provisions of Georgia law, the parties to the present litigation direct our attention to different sections of the Georgia Code. The government cites §113-105, which provides:

> "A will shall take effect instantly upon the death of the testator, however long the probate may be postponed."

The plaintiffs cite § 113-801, which provides:

> "All property, both real and personal, being assets to pay debts, no devise or legacy passes the title until the assent of the executor is given to such devise or legacy."

In addition to the sections cited to us by the parties, we consider relevant the provisions of § 113-802:

> "The assent of the executor may be express or may be presumed from his conduct. Assent should be evidenced by a conveyance of realty or tangible personalty or by an assignment or transfer of a chose in action. In the absence of a prior assent, the discharge of the executor shall be conclusive evidence of his assent. If no assent has been given within one year after the executor has qualified, a devisee or legatee may cite the executor in the court of ordinary to show cause why his assent should not be given or may compel him to assent by an equitable proceeding. The executor may not, by assenting to legacies, interfere with the rights of creditors, nor can he, by capriciously withholding his assent, destroy the legacy."

In construing these provisions of Georgia law, we must place the role of state law in its proper perspective.

Our concern is whether under Georgia law decedent received at the time of her sister's death a power whose contours bring it within the federal definition of a general power of appointment; we are not primarily concerned with the label attached to that power by state law. We are guided by the words of the Supreme Court in *Morgan v. Commissioner*, 1940, 309 U.S. 78, 80-81, 60 S.Ct. 424, 84 L.Ed. 585, 588:

> "State law creates legal interests and rights. The federal revenue acts designate what interests or rights so created, shall be taxed. Our duty is to ascertain the meaning of the words used to specify the thing taxed. If it is found in a given case that an interest or right created by local law was the object intended to be taxed, the federal law must prevail no matter what name is given to the interest or right by state law."

We turn, then, to Georgia law to ascertain the character of the interest which Martha O. Jenkins received at the moment of her sister's death. It is undisputed that she did not receive a fully perfected legal *title* to the property involved, for under Georgia law title vests initially in the executor of the estate rather than in the devisee. Georgia Code § 113-801; *Whatley v. Musselwhite*, 1939, 189 Ga. 91, 5 S.E.2d 227; *Miller v. Harris County*, 1938, 186 Ga. 648, 198 S.E. 673; *Willingham v. Watson*, 1928, 165 Ga. 870, 142 S.E. 458, 459. The purpose of this vesting of title in the executor, however, is not to cut off or diminish any beneficial interest of any devisee. Georgia has merely established a method to insure that the debts of the estate are paid, a procedural device to protect the creditors. See Georgia Code § 113-801; *Peck v. Watson*, 1928, 165 Ga. 853, 142 S.E. 450, 455; *City of Blakely v. Hilton*, 1920, 150 Ga. 27, 102 S.E. 340, 343.

Although a Georgia devisee does not receive a perfected *title* at the moment of the testator's death, he does receive the essence of his interest under the will. The Georgia Courts have said that a devisee receives an "inchoate title" subject to perfection when the executor assents to the devise. *Oliver v. Irvin*, 1964, 219 Ga. 647, 135 S.E.2d 376, 377; *Biggers v. Gladin*, 1948, 204 Ga. 481, 50 S.E.2d 585, 593; *McGahee v. McGahee*, 1948, 204 Ga. 91, 48 S.E.2d 675, 677; *Pope v. Stanley*, 1947, 202 Ga. 180, 42 S.E.2d 488, 491; *Matson v. Crowe*, 1942, 193 Ga. 578, 19 S.E.2d 288, 291; *Citizens' National Bank of Vidalia v. Citizens' & Southern Bank*, 1925, 160 Ga. 109, 127 S.E. 219, 221; *Watkins v. Gilmore*, 1904, 121 Ga. 488, 49 S.E. 598, 599.

It is clear that a Georgia devisee possessing an "inchoate title" has a genuine beneficial interest in the property. He has a right of action against the executor of the estate if the executor has not given his assent to the devise within one year after his qualification as executor. Georgia Code § 113-802. Even before the passage of a year the devisee can bring an action in equity to compel the executor to assent where his refusal to give his assent is unreasonable. *Clay v. Clay*, 1920, 149 Ga. 725, 101 S.E. 793; *Lester v. Stephens*, 1901, 113 Ga. 495, 39 S.E. 109. The devisee also has a right of action against the executor if he violates his obligations as a fiduciary. See *Dorsey v. Green*, 1947, 202 Ga. 655, 44 S.E.2d 377. Moreover, the devisee can bring an action against a third party to protect his interest in the property if the executor because of "fraud or collusion" fails to protect the devisee's rights. *Rogers v. Taintor*, 1955, 93 Ga. App. 54, 90 S.E.2d 629; *Coastal Public Service Co. v. Mordecai*, 1934, 49 Ga. App. 60, 174 S.E. 147. Furthermore, a devisee can execute a valid conveyance of the property prior to the assent of

the executor; when the executor assents to the devise, the perfected title inures to the benefit of the grantee of the conveyance rather than the devisee-grantor. *Walker v. Horton*, 1937, 184 Ga. 429, 191 S.E. 462, 464.

Thus the process of probating a will in Georgia is essentially a formal validation of the property interests which came into existence upon the death of the testator. See *Northrop v. Columbian Lumber Co.*, 5 Cir. 1911, 186 F. 770, 780. In Georgia, as in other jurisdictions, probate is title-accommodating rather than interest-creating.

We are compelled to reject plaintiffs' contention that Martha O. Jenkins could not have exercised her power of appointment prior to the probate of her sister's will. Under Georgia law she could have made conveyances of the property involved in this case at any time after her sister's death, subject only to subsequent perfection of the record title. The fact that she did not then possess a fully perfected record title is not controlling for federal estate tax purposes. The substantive powers she received at the time of her sister's death clearly came within the definition of a general power of appointment in § 2041(b)(1) of the Internal Revenue Code, and these powers were clearly exercisable at the time of her death.

In reaching a contrary result, the court below relied on *Townsend v. United States*, E.D. Tex. 1964, 232 F.Supp. 219, in which the court held that a power of appointment devised to a surviving wife by her husband's will did not pass to the wife prior to the probate of the will. In our opinion, however, the holding in *Townsend* is inapposite to the present case. *Townsend* was decided on the basis

of then-existing language in the Texas Probate Code[4] which has no counterpart in the Georgia Code. *Townsend* is no longer applicable even to Texas powers of appointment, for the Texas law has been amended;[5] it was never applicable to powers of appointment in Georgia.

Nothing in *Townsend* or in any other judicial decision can relieve the decedent's estate of the burden of paying estate taxes on the value of the property embraced by her power of appointment. Both Martha O. Jenkins and Ada Lee Jenkins planned their testamentary dispositions in such a manner that the surviving sister (Martha) would be able to exercise control over the property of the testatrix (Ada) immediately upon the

4. The decision of the district court in *Townsend* was based on a strained and hypertechnical interpretation of §.37 of the Texas Probate Code, which then provided in pertinent part as follows: "When a person dies, leaving a lawful will, all of his *estate* devised or bequeathed by such will shall vest immediately in the devisees or legatees. . . ." (Emphasis added.) The court seized upon the word "estate" to hold that the power of appointment did not pass to the surviving spouse prior to probate. The court expressed this holding in these words:

> "The fact that Mr. Musgrove conferred on Mrs. Musgrove the power of appointment in question here . . . did not of itself vest in Mrs. Musgrove any *estate* in the property bequeathed and devised to her. Such a power of appointment is no more than a personal privilege or a mere authority. It is not either property or a property right or interest in property. Furthermore, it is not an *estate* or an interest in an *estate*." 232 F. Supp. at 222 (emphasis added).

If the *Townsend* problem were now before us, we would look askance at the court's analysis of the word "estate" as used in the Texas Probate Code. The *Townsend* court's approach smacks of medieval fascination with technical concepts such as "seisin" and "enfeoffment."

The *Townsend* problem no longer exists, however, because the Texas Legislature amended the statute subsequent to the decision in *Townsend*. The relevant provision of § 37 of the Texas Probate Code now reads as follows: "When a person dies, leaving a lawful will, all of his estate devised or bequeathed by such will, *and all powers of appointment granted in such will*, shall vest immediately in the devisees or legatees of such estate *and the donees of such powers. . . .*" (Emphasis added.)

5. See footnote 4, *supra*.

death of the latter. This being true, the executors of Martha's estate cannot reasonably complain when confronted by the estate tax consequences of the sisters' plan of disposition. The fact that Martha died unexpectedly very soon after the death of Ada cannot change the character of the property interest which Martha possessed. The conclusion is inescapable that Martha received an exercisable general power of appointment at her sister's death and possessed the exercisable power at her death; the estate taxes demanded by the Commissioner must therefore be paid."

IV.

Plaintiffs finally contend that including the value of the property here involved in the gross estate of Martha O. Jenkins constitutes a deprivation of property without due process of law in violation of the Fifth Amendment. The district court did not reach this issue because of its findings favorable to the plaintiffs on two other issues. 296 F.Supp. at 210. We find it necessary to consider plaintiffs' constitutional argument, however, in view of the fact that on the preceding issues we have reached a decision adverse to the plaintiffs' position.

Plaintiffs base their constitutional argument on two premises. First, they contend that the property here involved passed directly from the estate of Ada Lee Jenkins to the remaindermen "without decedent at any time receiving the right to the use or benefit of those proper-

6. In the present case there is no problem concerning the *value* of the property embraced by the power of appointment. We note, however, that the value of property embraced by a power of appointment is diminished by charges or encumbrances lodged or lodgeable against it or the estate. For example, if property over which a power exists is worth $100,000 at the time of the testator's death, but $50,000 must be realized out of this property to pay debts of the testator's estate, then the taxable value of this property is only $50,000.

ties, or of the power or right to dispose of those properties." This argument is nothing more than a reiteration of plaintiffs' contention that Martha O. Jenkins received nothing by her sister's will at the time of her sister's death. In the light of our holding that Martha O. Jenkins *did* receive powers and rights at the time of her sister's death, this argument is untenable.

Secondly, plaintiffs contend that decedent was denied an opportunity to exercise her statutory right to disclaim or renounce the power of appointment. Section 2041(a)(2) grants to every donee of a post-1942 power the right to disclaim or renounce the power. If a decedent exercises this right, the value of the property as to which he has renounced the power will not be included in his gross estate. Moreover, the exercise of the right is not itself a taxable event.

Plaintiffs direct our attention to Treas. Reg. § 20.2041-3(d)(6), which provides:

> "A disclaimer or renunciation of a general power of appointment is not considered to be a release of the power. The disclaimer or renunciation must be unequivocal and effective under local law. A disclaimer is a complete and unqualified refusal to accept the rights to which one is entitled. There can be no disclaimer or renunciation of a power after its acceptance. In any case where a power is purported to be disclaimed or renounced as to only a portion of the property subject to the power, the determination as to whether or not there has been a complete and unqualified refusal to accept the rights to which one is entitled will depend on all the facts and circumstances of the particular case, taking into account the recognition and effectiveness of such a disclaimer under local law. Such rights refer to the incidents of the power and not to other interests of the decedent in the property. If effective under local law,

> the power may be disclaimed or renounced without disclaiming or renouncing such other interests. In the absence of facts to the contrary, the failure to renounce or disclaim within a reasonable time after learning of its existence will be presumed to constitute an acceptance of the power."

Relying on the final sentence of the quoted provision of the regulation, plaintiffs contend, in effect, that every donee of a general power of appointment is entitled to a reasonable time to disclaim or renounce before he can be charged with possession of the power. Applying this principle to the facts of this case, plaintiffs argue that Martha O. Jenkins did not have a reasonable time in which to exercise her right to disclaim or renounce.

Even if we were to assume *arguendo* that the principle for which plaintiffs contend is correct, they still would fail in their attempt to apply such a "reasonable time" principle to the facts of this case. In the first place, if plaintiffs' contention in this regard is based on the theory that decedent had not yet received any power because her sister's will had not yet been probated, then the contention is untenable for the reasons previously given. In addition, plaintiffs' contention must be rejected even if it is not based on the time-of-probate argument. The sentence of the regulation upon which plaintiffs heavily rely provides that "[i]n the absence of facts to the contrary, the failure to renounce or disclaim within a reasonable time *after learning of its existence* will be presumed to constitute an acceptance of the power." Treas. Reg. § 20.2041-3(d)(6) (emphasis added). Martha O. Jenkins was obviously aware of the existence of her power of appointment as soon as it came into her possession at the time of her sister's death. After all, she was not unfamiliar with the provisions of her sister's

will. Moreover, after her sister's death she had sufficient time to execute a document renouncing her designation as executrix under her sister's will. Had she desired to disclaim or renounce her power of appointment, she could have done so at that time. We would ignore reality if we were to accept plaintiffs' argument that decedent was somehow robbed of her right to renounce.

Plaintiffs' constitutional argument, like their other contentions, is completely devoid of merit. The power of appointment possessed by Martha O. Jenkins had taxable existentiality at her death and was untainted by any constitutional disablement. The Commissioner's inclusion within her estate of the value of the properties embraced by the power is fully sanctioned by law.

The judgment of the district court is REVERSED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1969

No. 27769

D. C. Docket No. CA 1275

ALONZO WIMBERLY JENKINS, JR., ET AL,
as Executors under the Will of
MARTHA O. JENKINS, Deceased,
Plaintiffs-Appellees,

versus

UNITED STATES OF AMERICA,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Georgia

Before GOLDBERG, DYER and CARSWELL,
Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed.

It is further ordered that plaintiffs-appellees pay to defendant-appellant, the costs on appeal to be taxed by the Clerk of this Court.

April 20, 1970

Issued As Mandate:

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 27769

ALONZO WIMBERLY JENKINS JR., ET AL,
as Executors under the Will of
MARTHA O. JENKINS, Deceased,
Plaintiffs-Appellees.

versus

UNITED STATES OF AMERICA,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Georgia

(June 1, 1970)

ON PETITION FOR REHEARING

Before GOLDBERG and DYER, Circuit Judges.*

PER CURIAM: The following paragraph, found on page 21 of the slip opinion, is hereby deleted:

> "We turn, then, to Georgia Law to ascertain the character of the interest which Martha O. Jenkins received at the moment of her sister's death. It is undisputed that she did not receive a fully perfected legal *title* to the property involved, for under Georgia law title vests initially in the executor of the estate rather than in the devisee. Georgia Code § 113-801; *Whatley v. Musselwhite*, 1939, 189 Ga. 91, 5 S.E.2d

*Judge Carswell was a member of the panel originally deciding this case but did not participate in this decision.

227; *Miller v. Harris County*, 1938, 186 Ga. 648, 198 S.E. 673; *Willingham v. Watson*, 1928, 165 Ga. 870, 142 S.E. 458, 459. The purpose of this vesting of title in the executor, however, is not to cut off or diminish any beneficial interest of any devisee. Georgia has merely established a method to insure that the debts of the estate are paid, a procedural device to protect the creditors. See Georgia Code § 113-801; *Peck v. Watson*, 1928, 165 Ga. 853, 142 S.E. 450, 455; *City of Blakely v. Hilton*, 1920, 150 Ga. 27, 102 S.E. 340, 343."

In lieu thereof the following paragraph is substituted:

"We turn, then, to Georgia law to ascertain the character of the interest which Martha O. Jenkins received at the moment of her sister's death. It is undisputed that she did not receive a fully perfected legal *title* to the property involved, for under Georgia law title does not vest in a devisee until the executor of the estate gives his assent to the devise. Georgia Code § 113-801; *Miller v. Harris County*, 1938, 186 Ga. 648, 198 S.E. 673; *Willingham v. Watson*, 1928, 165 Ga. 870, 142 S.E. 458. The purpose of this delay in the vesting of title, however, is not to cut off or diminish any beneficial interest of any devisee. Georgia has merely established a method to insure that the debts of the estate are paid, a procedural device to protect the creditors. See Georgia Code §§ 113-801, 113-802; *Peck v. Watson*, 1928, 165 Ga. 853, 142 S.E. 450; *City of Blakely v. Hilton*, 1920, 150 Ga. 27, 102 S.E. 340, 343."

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

ALONZO WIMBERLY JENKINS, JR., and McLENDON WASH JENKINS, as Executors under the Will of Martha O. Jenkins, Deceased, Plaintiffs. v. UNITED STATES OF AMERICA, Defendant.	Civil Action No. 1275

ELLIOTT, District Judge.

This is an action for the recovery of $26,962.73 in estate taxes plus interest thereon allegedly overpaid after assessment with respect to the estate of Martha O. Jenkins. The matter is before the Court for decision based upon fully stipulated facts which are in summary form as follows:

Martha O. Jenkins, the taxpayer or decedent, was the sister of Ada Lee Jenkins. On December 23, 1958, Ada Lee Jenkins executed a will by the terms of which she left to Martha O. Jenkins a life estate coupled with a power of invasion or consumption over certain real and personal property then owned by Ada Lee Jenkins, all of which was located in Muscogee County, Georgia. The relevant provisions of the will are substantially identical in language. A typical provision is as follows:

> "Should my sister, Martha O. Jenkins, survive me, then in that event, I give, bequeath and devise to Martha O. Jenkins all my right, title and interest in and to the real estate located in Muscogee County, Georgia, in land lots Forty (40), Forty-one (41), Forty-two (42), Twenty-three (23), and Twenty-four (24) in the 18th District of said County, to have, hold,

use and enjoy for and during her natural life, with full and unlimited power and authority to dispose of the same in fee simple by gift or otherwise at any time during her life without accountability to anyone, including, but not limited to, the right to sell the timber located on said property without the consent of anyone, and should my sister not dispose of my interest in said real estate during her lifetime, then on her death the same shall pass to and become the absolute property of my nephew, Alonzo Wimberly Jenkins, Jr., if he is then in life, but if he is not then in life, said real estate shall pass to, vest absolutely in and become the property of the surviving child or children of the said Alonzo Wimberly Jenkins, Jr."

On September 24, 1962, Ada Lee Jenkins died leaving an estate of real and personal property located in Georgia of the approximate value of $143,000.00. At the time of the death of Ada Lee Jenkins, Martha O. Jenkins was 82 years of age and she survived her sister by only 17 days, the date of her death being October 11, 1962. The will of Ada Lee Jenkins was not offered or admitted for probate until October 25, 1962, 31 days after the death of Ada Lee Jenkins, and 14 days after the death of Martha O. Jenkins.

After an audit of the decedent's estate tax return an adjustment was made, the effect of which was to add to the gross estate of Martha O. Jenkins an amount of $125,468.00, this being the value of property over which the Government contends Martha O. Jenkins possessed a general power of appointment pursuant to the provisions of the will of Ada Lee Jenkins. The deficiency resulting from this adjustment was paid by the Plaintiffs and after the rejection of their claim for refund this suit was commenced.

The question presented is whether in these unusual circumstances Martha O. Jenkins had at the time of her death a general power of appointment over her sister's estate within the meaning of §2041(a)(2) of the Internal Revenue Code.

The pertinent statutes are as follows:

"(2) POWERS CREATED AFTER OCTOBER 21, 1942.—To the extent of any property with respect to which the decedent has at the time of his death a general power of appointment created after October 21, 1942, or with respect to which the decedent has at any time exercised or released such a power of appointment by a disposition which is of such nature that if it were a transfer of property owned by the decedent, such property would be includible in the decedent's gross estate under sections 2035 to 2038, inclusive. A disclaimer or renunciation of such a power of appointment shall not be deemed a release of such power. For purposes of this paragraph (2), the power of appointment shall be considered to exist on the date of the decedent's death even though the exercise of the power is subject to a precedent giving of notice or even though the exercise of the power takes effect only on the expiration of a stated period after its exercise, whether or not on or before the date of the decedent's death notice has been given or the power has been exercised."

Sec. 2041(a)(2), Internal Revenue Code.

"(1) GENERAL POWER OF APPOINTMENT.—The term 'general power of appointment' means a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate; except that—

(A) A power to consume, invade, or appropriate property for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support, or mainte-

nance of the decedent shall not be deemed a general power of appointment."

Sec. 2041(b)(1)(A), Internal Revenue Code.

The Plaintiffs' first contention is that no general power of appointment in Martha O. Jenkins was created by the will of Ada Lee Jenkins since the powers granted to Martha O. Jenkins under the will were not exercisable in her favor or in favor of her estate and that therefore such power did not qualify as a general power of appointment under Sections 2041(b) and 2041(a)(2) of the Internal Revenue Code.

This contention of the Plaintiffs appears to be consistent with the decision of the Fifth Circuit Court of Appeals in *United States of America v. Bank of Clarksdale, Executor of the Estate of Mae Suddoth Barr, deceased,* 346 F.2d 638 (1965). In that case a husband had executed a will under the terms of which he had bequeathed to his wife a life estate in all of his property with an unlimited power of encroachment and consumption with remainders to certain other persons, and the decision in that case turned on the question whether the wife had received a general power of appointment under the will of her husband. In that case the United States took two positions, first contending that there was no general power of appointment and contending in the alternative that if there was such a general power it was not exercised. The case arose in Mississippi and the Supreme Court of Mississippi had construed the will involved as devising to Mrs. Barr a life estate in all of the property of her husband with an unlimited power of disposition. The District Court *assumed* that there was a general power of appointment. The Court of Appeals disagreed and reversed the District Court, holding in favor of the contentions of the United States, concluding that there was no

general power of appointment since such power of appointment, if any, as Mrs. Barr received could not be exercised by her will. In its opinion the Court of Appeals stated that the husband intended his wife's power of disposition over his property to be *inter vivos* only, concluding that "Mrs. Barr did not receive a power of appointment under the will of Mr. Barr capable of being exercised by her will. It follows that the property is not property includable in her estate under 26 USCA §2041 . . .". (p. 642). In the body of its opinion the Court of Appeals reviewed the applicable Mississippi law which was relied upon by the United States and concluded that under the Mississippi law a life estate with an unlimited power of *inter vivos* disposition over the property involved did not include a power in the life tenant to appoint by will. An examination of the Mississippi cases discussed by the Court of Appeals indicates that the law of Mississippi is the same as the law of Georgia except that we are impressed that it may be even clearer under the law of Georgia that a life estate with an added power of disposal conferred upon the life tenant does not enlarge the life estate into an estate in fee and does not include any right in the life tenant to dispose of the property by will, for in *Jenkins, Executrix v. Shuften, et al.*, 208 Ga. 315 (1950), the Supreme Court of Georgia said (headnote 2):

> "A power of disposition contained in a will and the mode of its exercise, when the latter will have the effect of cutting out executory devisees, will be strictly construed; and when such power of disposition must be exercised by the holder of a defeasible fee during his lifetime, he is not authorized to dispose of the property by will, but only by an inter vivos conveyance."

The Court of Appeals in the *Barr* case stated that its decision was on the basis of relevant Mississippi deci-

sions which "we must look to for direction in this regard". The relevant language of the will of Ada Lee Jenkins is: "I give, bequeath and devise to Martha O. Jenkins all my right, title and interest . . . to have, hold, use and enjoy for and during her natural life with full and unlimited power and authority to dispose of the same in fee simple by gift or otherwise at any time during her life without accountability to anyone, including, but not limited to, the right to sell the timber located on said property without the consent of anyone . . .". Since it is clear that such language under Georgia law does not authorize the disposition of the property by will, but only by an *inter vivos* conveyance, it does not appear that the case now before the Court can be distinguished in any way from the *Barr* case, and we are therefore led to conclude that no general power of appointment in Martha O. Jenkins was created by the will of her sister.

The Plaintiff's second contention is that since the will of Ada Lee Jenkins had been neither filed for probate nor offered for probate nor probated prior to the death of Martha O. Jenkins it follows that at the date of the death of Martha O. Jenkins she did not have or possess an exercisable general power of appointment under or by virtue of the will of her sister, and therefore had no taxable power of appointment under §§ 2041(a)(2) and 2041(b)(1) of the Internal Revenue Code.

In *Townsend, Executor v. United States*, 232 F.Supp. 219 (1964), the United States District Court for the Eastern District of Texas dealt with this same question in a setting factually similar to the case at bar (now before us). In that case it appeared that on May 10, 1951 a husband executed a will bequeathing to his wife all of his estate for and during her natural life with remainder to the testator's children, and under the terms of the will

he gave his wife the "full and unrestricted right, power and authority during her natural life to use, enjoy, manage, control, pledge, mortgage, sell, give or otherwise dispose of, except by will, all or any portion of said property the same as though she were the owner in fee simple thereof," but providing that any remainder at her death should be divided among designated children. On May 18, 1959, the husband died and 6 days later, on May 24, 1959, the wife died. At the time of the widow's death the husband's will had been neither offered for probate nor admitted to probate, and subsequent to the death of the wife the will of the husband and the will of the wife were filed for probate and duly admitted to probate. In that case the Government contended that the entire net estate of the husband was includable in the estate of the wife for estate tax purposes by virtue of the general power set out in the will. The Court rejected that contention, concluding at page 222 that:

> ". . . because the will of Mr. Musgrove had neither been probated nor offered for probate at the time of Mrs. Musgrove's death, Mrs. Musgrove did not, at the time of her death, possess the power of appointment conferred upon her in her husband's will. Thus it follows that the Internal Revenue Service erroneously included in the tax estate of Mrs. Musgrove the entire net estate of J. W. Musgrove, of which he died seized and possessed."

The Court's ruling is succinctly stated in the third headnote of the opinion as follows:

> "Where widow died before will of husband was probated or offered for probate, she had no 'power of appointment' under will within meaning of statute providing that decedent's gross estate for estate tax purposes shall include value of all property over which decedent at time of his death had general 'power of appointment'."

The District Court gave consideration to the appropriate provisions of the Probate Code of Texas, concluding that the power of appointment conferred upon the wife did not of itself vest in the wife any estate in the property bequeathed and devised to her, stating that "such power of appointment is no more than a personal privilege or a mere authority. It is not her property or a property right or interest in property" (p. 222).

The facts in this case now before us and the applicable Georgia law present a case as strong or stronger than the *Townsend* case presented to the District Court in Texas.

Under Georgia law a power of appointment is not an estate and has none of the elements of an estate. *Patterson & Company v. Lawrence,* 83 Ga. 703 (1889)). Further, Item 16 of the will of Ada Lee Jenkins provides in part that ". . . *upon the probate and admission to record* of this my will, it is my desire that my executrix, executors or executor, administer my estate . . .". (Emphasis supplied.) Coupled with this specific provision of the will it is clear that under Georgia law the assent of the executor is necessary to pass title to any device or legacy because the Code of Georgia Annotated provides in Title 113-801 that:

> "All property, both real and personal, being assets to pay debts, no devise or legacy passes the title until the assent of the executor is given to such devise or legacy."

As heretofore noted, the will of Ada Lee Jenkins was not filed for probate until after the death of Martha O. Jenkins and the evidence further shows that it was some months after the death of Martha O. Jenkins before there was any assent by the executors to any bequest or devise under the will of Ada Lee Jenkins. A will must be pro-

bated in Georgia before it can become effectual. *Chidsey, et al. v. Brookes, et al.*, 130 Ga. 218, 220 (1907); *Foster, et al. v. Foster, et al.*, 207 Ga. 519 at 527 (1951).

Applying the legal principles heretofore discussed to the facts of this case we deem it to be clear that under Georgia law Martha O. Jenkins could receive no exercisable power of appointment under or by virtue of the will of her sister, the will having neither been filed for probate nor offered for probate nor probated prior to the death of Martha O. Jenkins. Moreover, it is clear that Martha O. Jenkins received no property rights nor interest in property by virtue of the will of Ada Lee Jenkins since a power of disposal under Georgia law is not a property right or interest in property, and since a life estate could not pass to or vest in Martha O. Jenkins because the will of Ada Lee Jenkins had not been probated at the time of the death of Martha O. Jenkins and because the executors named in the will had not qualified nor assented to any devise or legacy in favor of Martha O. Jenkins or any other person.

In support of their position Counsel for the Government place considerable stress upon what counsel describe as the distinction between pre-1942 powers of appointment and post-1942 powers of appointment, stating the distinction to be that "pre-1942 powers are taxable only if *exercised* . . . while post-1942 powers are taxable regardless of whether they are exercised", calling our attention to the decision in *United States v. Merchants National Bank of Mobile*, 261 F.2d 570 (5 Cir. 1958). We recognize that the statutes heretofore quoted make this distinction, but what we are dealing with here is a power which not only was not exercised but was not *exercisable*, and the statutes recognize that for a general power to be includable in an estate for tax purposes it

must be exercisable. Indeed, the definition of the term "general power of appointment" as found in §2041(b)(1) of the Internal Revenue Code is that the term "means a power which is *exercisable* in favor of the decedent, . . .". (Emphasis supplied.)

An examination of the decision in *United States v. Merchants National Bank of Mobile*, supra, shows that the Court in that case recognized the essential distinction between a power which has been created and has become exercisable and a power on the other hand which might have been created and possessed, but has not become exercisable. In the body of the opinion the Court stated:

> "[2, 3] Undoubtedly, at or before the time of the taxable event, that is, at or before the death of the decedent, *the power must be exercisable in order for its mere possession to be taxable,*" (emphasis supplied) "for Section 811(f)(2) states that the value of the gross estate of a decedent includes the value at the time of death to the extent of any property with respect to which the decedent *has at the time of his death* a general power of appointment created after October 21, 1942 * * *." (Emphasis in original.) "If the power of appointment is exercisable at the time of death, it is not material that it was theretofore subject to certain conditions . . ." (p. 573).
>
> ". . . *On the other hand, if the power is conditioned upon an event which had not occurred at the time of the decedent's death, the appointive property is not taxable as a part of the decedent's estate* . . ." (p. 573). (Emphasis supplied.)
>
> ". . . If exercisable *at the time of death, there is that essential control over the property, and shifting of the economic benefits to make the appointive property taxable as a part of the decedent's estate.*" (Emphasis supplied.)

"Clearly enough, then, *at the time of the incidence of the tax a general power of attorney must be exercisable.* The verb and phrase used in reference to that moment, 'has at the time of his death,' are definite in denoting one precise instant of time. On the other hand, 'created on or before October 21, 1942' connotes some idea of the past and of the future." (Emphasis supplied.)

"The fact that a general power of appointment must be exercisable at the time of the decedent's death does not prevent the tracing of its creation back to the time before it became exercisable. It is said that Athena sprang full-grown from the brain of Zeus, but not every power is exercisable when the instrument from which it is derived first becomes effective. 'Create' ordinarily implies going back to the very beginning of a thing, as for example, 'God *created* the heaven and the earth,' Genesis, c. 1. It may well be argued, we think, that these general powers of appointment had their beginning, were 'created', for a long while before they became exercisable." (pp. 573, 574) (Emphasis in original.)

The Plaintiff's third contention is that no general power of appointment in Martha O. Jenkins was created by the will of Ada Lee Jenkins because the powers, if any, received by Martha O. Jenkins under her sister's will were limited by an ascertainable standard relating to the support or maintenance of Martha O. Jenkins, there being no need on her part to consume, invade or appropriate property constituting assets of the estate of her sister and that for this reason such powers did not qualify as a general power of appointment under §§2041(b)(1)(A) and 2041(a)(2) of the Internal Revenue Code.

In this connection the evidence shows that at the time of her sister's death Martha O. Jenkins was 82 years of age and was possessed of a substantial estate in her

own right consisting of real and personal property having a value of approximately $150,000.00. The evidence further shows that the two sisters lived in a very conservative manner, growing their own vegetables and raising their own chickens and spending not more than about $5.00 a week for groceries. They wore black cotton dresses and would spend money on nothing unless it was absolutely necessary. It is interesting to note that they resisted until the end the urgings of their relatives that they buy themselves a television set, which fact may be regarded not only as evidence of their frugality but as a monument to their discretion.

The Court is convinced that Martha O. Jenkins would never have encroached upon her sister's estate to satisfy any of her own meager wants or needs, first because she had no need to do so, and second because the remaindermen named in her sister's will were the same remaindermen who were the beneficiaries under her own will later probated, but the question is not what she *would* have done with the property, but rather what she *could* have done with it.

The power with respect to real estate passing under the will was as follows:

> "Should my sister, Martha O. Jenkins, survive me, then in that event, I give, bequeath and devise to Martha O. Jenkins all my right, title and interest in and to the real estate located in Muscogee County, Georgia, in Land Lots Forty (40), Forty-one (41), Forty-two (42), Twenty-three (23), and Twenty-four (24) in the 18th District of said County, to have, hold, use and enjoy for and during her natural life, *with full and unlimited power and authority to dispose of the same in fee simple by gift or otherwise at any time during her life without accountability to anyone*, including, but not limited to, the right to

> sell the timber located on said property without the consent of anyone, and should my sister not dispose of my interest in said real estate during her lifetime, then on her death the same shall pass to and become the absolute property of my nephew, Alonzo Wimberly Jenkins, Jr., if he is then in life, but if he is not then in life, said real estate shall pass to, vest absolutely in and become the property of the surviving child or children of the said Alonzo Wimberly Jenkins, Jr." (Emphasis added.)

It is to be noted that the power is to convey her sister's property by "gift or otherwise" during the devisee's lifetime and it is difficult to see how such language creates "an ascertainable standard relating to the support or maintenance of taxpayer", as contended by the Plaintiff. Under Georgia law the language used in the will gave Martha O. Jenkins the free right to consume or give away her sister's property. On less sweeping language the Supreme Court of Georgia in *Williams v. Jones*, 219 Ga. 45 (1963), refused to find any implied restriction on the use of property. It is clear that if a testator uses language to limit the circumstances under which a power can be exercised the Georgia courts will enforce that intent. Thus, in *Osborn v. Morrison*, 219 Ga. 169 (1963), a will which gave a widow rights of invasion only if she "is in need of funds for her support and maintenance" was interpreted by the Court to mean that the widow did not have the right to convey a fee simple title to the property *unless* she was in need of funds for her support and maintenance, thus following the expressed intent of the testator just as the Court had done earlier in the *Williams* case when it refused to find an implied restriction on a right to invade and consume the estate. The plain rule of these two decisions is that in Georgia the expressed intent of the testator will be followed and that no "sup-

port and maintenance" limitation will be implied. Applying this test to the will of Ada Lee Jenkins we can only conclude that the will gave Martha O. Jenkins an unlimited right to consume or give away *inter vivos* any or all of her sister's property regardless of whether such encroachment was for support and maintenance or for some other purpose.

In support of the contention here made Counsel for the Plaintiff cite and rely upon a decision by our distinguished predecessor, Judge T. Hoyt Davis, in *Schwab v. Allen*, 78 F.Supp. 234 (1948), wherein it was held that the power of encroachment given the husband under the will of his wife came within the exception in that there was no likelihood, considering the husband's circumstances, that he would ever have encroached upon the corpus of the wife's estate. An examination of the language of the will there under consideration, however, shows that the power given the husband was not unlimited for there the testator provided that "the entire income from my estate shall be paid to my beloved husband, Otto Schwab, during his life, with the privilege to my said husband to encroach upon the principal or corpus to such extent as in his sole judgment *is necessary or desirable from the standpoint of his welfare.*" (Emphasis supplied.) The clear implication of this language was that the power was to be exercised only in the event of the need of the husband to do so. The language used in that instrument is in sharp contrast with the language used in the will of Ada Lee Jenkins.

In summary, we sustain the Plaintiff's first contention that no general power of appointment was created and the Plaintiff's second contention that the decedent at the time of her death did not have or possess an exercisable general power of appointment, but we find the

Plaintiff's third contention, that any power which may have been conferred was limited by an ascertainable standard, not to be sustained.

The defendant's fourth contention to the effect that the inclusion of the value of the property constituting assets of the estate of Ada Lee Jenkins as a part of the gross estate of Martha O. Jenkins and the assessment of a tax deficiency based on such inclusion, is contrary to law and constitutes a deprivation of the property of Martha O. Jenkins without due process of law presents a constitutional question which we do not find it necessary to decide in view of the rulings here made on the Plaintiff's other contentions.

Consistent with the foregoing, judgment as prayed for will be entered for the Plaintiff, the form of which will be prepared and submitted by counsel.

IT IS SO ORDERED this 9th day of December, 1968.

J. Robert Elliott
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

ALONZO WIMBERLY JENKINS, JR., and McLENDON WASH JENKINS as Executors under the Will of Martha O. Jenkins, Deceased, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	Civil Action No. 1275

Judgment

WHEREAS, this action came on to be tried before the Court, Honorable J. Robert Elliott, District Judge, presiding, without a jury, pursuant to the agreement of the parties, and based upon fully stipulated facts, documents, and depositions, and after argument by written briefs submitted by counsel for the parties; and

WHEREAS, the issues having been duly tried and a decision having been duly rendered in favor of the plaintiffs by written opinion of the Court filed December 9, 1968, incorporating therein the Court's findings of fact and conclusions of law;

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED that the Plaintiffs; Alonzo Wimberly Jenkins, Jr., and McLendon Wash Jenkins, as Executors under the Will of Martha O. Jenkins, Deceased, recover of Defendant, United States of America, the principal sum of Twenty-six Thousand, Nine Hundred Sixty-two and 73/100 Dollars ($26,962.73), together with interest on said principal sum from February 16, 1967, at the rate of Six Per Cent (6%) per annum as provided by law, and plaintiffs' costs of this action.

ted at Columbus, Georgia, this 24 day of January,

/s/ .....

J. Robert Elliott, Judge
United States District Court
Middle District of Georgia
Columbus Division

PREME COURT, U. S.

No. 962

AUG 12 1970

E. ROBERT SEAVER, C

In the Supreme Court of the United States

OCTOBER TERM, 1970

ABONZO WIMBERLY JENKINS, JR. and McLENDON WASH JENKINS, AS EXECUTORS UNDER THE WILL OF MARTHA O. JENKINS, DECEASED, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

JOHNNIE M. WALTERS,
Assistant Attorney General,

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 402

ALONZO WIMBERLY JENKINS, JR. and MCLENDON WASH JENKINS, AS EXECUTORS UNDER THE WILL OF MARTHA O. JENKINS, DECEASED, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. A28-A42) is reported at 296 F. Supp. 203. The opinion of the court of appeals (Pet. App. A1-A24), as modified (Pet. App. A26-A27), is not yet reported.

JURISDICTION

The court of appeals entered an opinion and judgment on April 20, 1970 (Pet. App. A1-A25). An or-

der modifying its opinion and denying a petition for rehearing was entered on June 1, 1970 (Pet. App. A26). The petition for a writ of certiorari was filed on July 15, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether decedent, a devisee of an inter vivos power under a will not probated as of the date of her death, died possessed of a general power of appointment within the meaning of Section 2041 of the Internal Revenue Code of 1954.

STATUTE INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 2041. POWERS OF APPOINTMENT.

(a) *In General.*—The value of the gross estate shall include the value of all property.

(1) *Powers of appointment created on or before October 21, 1942.*—To the extent of any property with respect to which a general power of appointment created on or before October 21, 1942, is exercised by the decedent—

(A) by will * * *

* * * *

(2) *Powers created after October 21, 1942.*—To the extent of any property with respect to which the decedent has at the time of his death a general power of appointment created after October 21, 1942 * * *

* * * *

(b) *Definitions.*—For purposes of subsection (a)—

(1) *General power of appointment.*—The term "general power of appointment" means a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate; except that—

(A) A power to consume, invade, or appropriate property for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent shall not be deemed a general power of appointment.

* * * *

STATEMENT

Decedent[1] and her sister, Ada Lee Jenkins, both unmarried, lived together in Midland, Georgia, for many years prior to their deaths (Pet. App. A2; R. 20).[2] On December 23, 1958, both sisters, who were then in their seventies, executed wills which were very similar in wording and provisions (Pet. App. A2; R. 23-32, 33-43). Each sister left the other a life estate coupled with a power of invasion or consumption over the testatrix' property (Pet. App. A2).

On September 24, 1962, Ada Lee Jenkins died (Pet. App. A2; R. 18). Shortly thereafter, on Oc-

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[1] References to "decedent" are to Martha O. Jenkins; the executors of her estate are the petitioners herein.

[2] "R." references are to the record appendix filed in the court of appeals.

tober 4, 1962, decedent executed a document renouncing her designation as executrix under her sister's will (Pet. App. A2; R. 49). She apparently took no other action with regard to the will (Pet. App. A2). Although decedent had previously been in good health, on October 10, 1962, seventeen days after her sister's death, she suffered a heart attack and died the following day (Pet. App. A2; R. 20). Owing to the short time period between the death of the two sisters, the will of Ada Lee Jenkins had not been probated at the time of decedent's death (Pet. App. A2). The wills of both sisters were thereafter filed and admitted for probate on October 25, 1962 (Pet. App. A2; R. 19, 20).

Each of several provisions in the will of Ada Lee Jenkins[3] leaving property to decedent included language stating in substance (Pet. App. A4-A5) that—

> Should my sister, [decedent], survive me, then in that event, I give, bequeath and devise to * * * [decedent] all my right, title and interest in and to * * * [certain named property] to have, hold, use and enjoy for and during her natural life, with full and unlimited power and authority to dispose of the same in fee simple by gift or otherwise at any time during her life without accountability to anyone * * * and should * * * [decedent] not dispose of my interest in said * * * [property] during her lifetime, then on her death the same shall pass to and become the absolute property of * * * [a certain named remainderman].

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[3] The relevant clauses of the will in their entirety are set forth at Pet. App. A3-A5, n. 1.

The district court held that the value of the property subject to such power of appointment was not includible in decedent's gross estate for federal tax purposes because (1) an inter vivos power does not qualify as a general power under Section 2041 of the Internal Revenue Code of 1954 (Pet. App. A31-A33), and (2) in any event, the power never came into existence since decedent died before the will creating it was probated (Pet. App. A33-A38).

On appeal, the Fifth Circuit reversed, holding that (1) the statutory definition of general powers includes inter vivos powers exercisable in favor of a decedent or her creditors (Pet. App. A6-A11), and (2) the interest decedent received at the time of her sister's death and before probate constituted a genral power of appointment within the meaning of Section 2041 (Pet. App. A15-A21). The court rejected petitioners' additional contentions that decedent's power was not a general power because it fell within the "ascertainable standard" exception found in Section 2041(b)(1)(A) (Pet. App. A12-A14), and that the inclusion of the property violated the Due Process Clause of the Fifth Amendment (Pet. App. A21-A24).

ARGUMENT

The decision below is correct. There is no conflict or other reason for review.

1. Section 2041(a)(2) of the 1954 Code, *supra*, p. 2, requires inclusion in the gross estate of the value of "any property with respect to which the decedent has at the time of his death a general power

of appointment created after October 21, 1942 * * *." Section 2041(b)(1), *supra*, p. 3, defines a "general power of appointment" as "a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate * * *."

The statute's definition is plainly phrased in the disjunctive, and, therefore, an inter vivos power constitutes a general power of appointment within the meaning of the statute. See *Estate of Edelman* v. *Commissioner*, 38 T.C. 972, 977; Lowndes and Kramer, *Federal Estate & Gift Taxes* (2d ed.), p. 262; Craven, *Powers of Appointment Act of 1951*, 65 Harv. L. Rev. 55, 70; 2 Mertens, *Law of Federal Gift & Estate Taxation*, Sec. 19.09, p. 519. In this instance, the language of the will, *supra*, p. 4, authorized decedent to exercise the power in favor of herself or her creditors and thus constituted a general power under Section 2041.[4]

2. The court of appeals' conclusion (Pet. App. A14-A21) that decedent possessed a power of appointment at the time of her death, although her sis-

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[4] Petitioners' reliance (Pet. 10-11, 21-22, 24-25) on *United States* v. *Bank of Clarksdale*, 346 F. 2d 638 (C.A. 5), is misplaced, since that case involved a pre-1942 general power. Unlike pre-1942 powers, post-1942 powers, such as that involved here, need not be exercised to be taxed. The holding in *Bank of Clarksdale* was merely that there was no taxable inclusion under Section 2041 because the decedent had not exercised a pre-1942 power. Also distinguishable is *United States* v. *Merchants National Bank of Mobile*, 261 F. 2d 570 (C.A. 5), cited by petitioners (Pet. 10, 18-19), which, like *Bank of Clarksdale*, involved a pre-1942 power. At all events, the cited cases, like the instant case, were decided by the Fifth Circuit, and there is thus no conflict warranting review by this Court.

ter's will had not been probated, is correct. Accord, *Estate of Bagley* v. *United States*, 70-1 USTC, par. 12,694 (M.D. Fla.). It is a settled rule for federal estate tax purposes that rights and interests conveyed by will are deemed to come into existence immediately upon the testator's death. See *Estate of Rogers* v. *Commissioner*, 320 U.S. 410, 413-414; cf. *Detroit Bank* v. *United States*, 317 U.S. 329, 332; *Hertz* v. *Woodman*, 218 U.S. 205, 219-220. This rule not only provides "a test of taxability which is simple, clear-cut, and easy to apply" (S. Rep. No. 382, 82d Cong., 1st Sess., p. 3), but also prevents a situation where the federal taxing provisions would become enmeshed in the "recondite niceties of property law" incident to the timing of perfection of title under the various state probate proceedings (see *Estate of Rogers* v. *Commissioner*, *supra*, p. 414).[5]

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[5] There is no language in the will itself which evidences a desire on the part of the testatrix that decedent's power of appointment was to be postponed until some time after the testatrix' death. On the contrary, relevant portions of the will indicate that decedent was to obtain the power the moment the testatrix died. For example, Items Five, Seven, Nine and Eleven of the will begin with the words that "Should my sister, Martha O. Jenkins [decedent], survive me, then and in that event, I give, bequeath, and devise to Martha O. Jenkins all my right, title and interest * * *" (R. 24-28). Petitioners' reliance (Pet. 19) on the words in Item Sixteen, "Upon the probate and admission to record of this my will * * *, is misplaced. As the court of appeals held (Pet. App. A15), these words taken "in the context of the entire sentence * * * have reference only to the procedure of probating the will, and not to the timing of the passage of the power of appointment to * * * [decedent]."

Moreover, Georgia law is in accord. Although a Georgia devisee does not receive a perfected title at the moment of the testator's death, he does receive the essence of his interest under the will—an "inchoate title" subject to perfection when the executor assents to the devise. Here, decedent could have exercised her power of appointment before the executors of her sister's estate assented to the devise. The assent of the executors would only have perfected the title of those in whose favor the power had been exercised. See *Walker* v. *Horton*, 184 Ga. 429, 431, 191 S.E. 462, 464.[6] The court of appeals' holding to this effect (Pet. App. A18-A19) is correct. There is no basis for further review of that holding. *Commissioner* v. *Estate of Bosch*, 387 U.S. 456, 462.

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[6] *Woodall* v. *Pharr*, 119 Ga. App. 692, 168 S.E. 2d 615, affirmed, 226 Ga. 1, 172 S.E. 2d 404, relied on by petitioners (Pet. 15-16), is not in point, merely holding that, in the apparent absence of a will, a decedent's heirs at law could, upon tender of rents, succeed to the decedent's rights as a lessee pursuant to the lease. *Chidsey* v. *Brookes*, 130 Ga. 218, 220, 60 S.E. 529, 530, cited by petitioners (Pet. 13, 15), is distinguishable, holding only that in an action involving disputed title to land, plaintiffs, whose title was derived solely from an unprobated will, were not entitled to recover without probating the will. This latter case was distinguished for like reason in *Northrop* v. *Columbian Lumber Co.*, 186 Fed. 770, 779-780 (C.A. 5). Similarly, *Foster* v. *Foster*, 207 Ga. 519, 527, 63 S.E. 2d 318, 324 (Pet. 15), held that a will must be proved and probated before it can disinherit an heir at law. *Osborn* v. *Morrison*, 219 Ga. 169, 132 S.E. 2d 58 (Pet. 17), involved the devise of a life estate coupled with a power to sell for the devisee's "support and maintenance"; the devise here is much broader (see R. 25-26; Pet. App. A12-A14). The government contended below that the holding of *Townsend* v. *United States*, 232 F. Supp. 219 (E.D. Tex.), was erroneous and the Fifth Circuit agreed (Pet. App. A19-A20, n. 4).

3. Decedent's power of appointment did not fall within Section 2041(b)(1)(A), which excepts from the definition of a general power "A power to consume, invade, or appropriate property for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent * * *." Here, the will granted decedent (Pet. App. A14) "full and unlimited power and authority to dispose of the [property] in fee simple by gift or otherwise at any time during her life without accountability to anyone." That power was not limited by any "ascertainable standard" within the meaning of Section 2041(b)(1)(A). See Pet. App. A12-A14, A38-A41.

4. As noted above, *supra*, pp. 6-8, decedent possessed an exercisable power of appointment although the will had not been probated. Taxation of property subject to such a power is constitutional, since application of a tax to possession generated by death is permissible. *Fernandez* v. *Wiener*, 326 U.S. 340, 353; *Synder* v. *United States*, 203 F. Supp. 195, 201 (W.D. Ky.). Moreover, petitioner, who was "aware of the existence of her power of appointment as soon as it came into her possession at the time of her sister's death" (Pet. App. A23), could have avoided the tax by renouncing it. She did not do so.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1970.

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